

No. 87-1344-CFX
Status: GRANTED

Title: Richard L. Thornburgh, Attorney General of the
United States, et al., Petitioners,
v.
Jack Abbott, et al.

Docketed:

February 10, 1988

Court: United States Court of Appeals for
the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Bronstein, Alvin J., Mescher, Kelly,
Ney, Steven

NOTE: Ext. of time filed 12/23/87 & grant. on
12/24/87 by Rehnquist, CJ until 2/10/88 cited

Entry	Date	Note	Proceedings and Orders
1	Dec 23 1987		Application for extension of time to file petition and order granting same until February 10, 1988 (Chief Justice, December 24, 1987).
2	Feb 10 1988	G	Petition for writ of certiorari filed.
4	Feb 26 1988		Order extending time to file response to petition until April 1, 1988.
5	Apr 1 1988		Brief of respondents Jack Abbott, et al. in opposition filed.
6	Apr 6 1988		DISTRIBUTED. April 22, 1988
7	Apr 15 1988	X	Reply brief of petitioner Meese, Atty. General filed.
8	Apr 25 1988		Petition GRANTED. *****
10	May 31 1988		Order extending time to file brief of petitioner on the merits until June 30, 1988.
11	Jun 28 1988		Brief amici curiae of Florida and Idaho filed.
14	Jun 29 1988		Brief amicus curiae of Missouri filed.
12	Jun 30 1988		Brief of petitioner Meese, Atty. Gen. filed.
13	Jun 30 1988		Joint appendix filed.
15	Jul 8 1988		Lodgings received. (11 copies).
17	Jul 11 1988		Order extending time to file brief of respondent on the merits until August 23, 1988.
22	Jul 20 1988		Record filed.
		*	Certified original record received.
19	Aug 23 1988		Brief amicus curiae of Correctional Assn. of New York filed.
20	Aug 23 1988		Brief of respondents Jack Abbott, et al. filed.
21	Aug 23 1988		Brief amici curiae of Assn. of American Publishers, Inc., et al. filed.
18	Aug 24 1988		Lodging received.
23	Sep 22 1988		Reply brief of petitioners Richard Thornburgh, et al. filed.
24	Sep 28 1988		CIRCULATED.
26	Oct 20 1988		Set for argument. Tuesday, November 8, 1988. (1st case) (1 hr.)
27	Nov 8 1988		ARGUED.

87-1344

Supreme Court, U.S.

FILED

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CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

**EDWIN MEESE III, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS**

v.

JACK ABBOTT, ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the constitutionality of prison regulations and policies governing the receipt of publications by federal prisoners should be evaluated under the strict scrutiny standard enunciated in *Procunier v. Martinez*, 416 U.S. 396 (1974).

PARTIES TO THE PROCEEDINGS

In addition to the petitioner named in the caption, the following were defendants in the district court and are petitioners in this Court: Elliott L. Richardson, Norman A. Carlson, Ralph A. Aaron, Noah Allredge, Marvin R. Hgan, George W. Pickett, Elwood O. Toft, Charles Campbell, P.J. Ciccone, Loren E. Daggett, James Henderson, Mason Holley, John J. Norton, Paul Walker, and Samuel J. Britton. Additional petitioners, who are defendants pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, are the current director of the Bureau of Prisons and the current wardens at various federal prisons: J. Michael Quinlan, John Sullivan, Calvin Edwards, Patrick W. Keohane, Gary Henman, Tom C. Martin, Charles Turnbo, Al Turner, Joseph Petrovsky, Robert Honstead, Dennis Luther, Roderick D. Brewer, and Robert Matthews.

In addition to the respondent named in the caption, the following were plaintiffs in the district court and are respondents in this Court: the Prisoners' Union, Weekly Guardian Associates, and the Revolutionary Socialist League.

In addition to the various claims for equitable relief, respondents' lawsuit also involves individual damage actions by 82 named plaintiffs. Those claims were severed by the district court in 1979; they have not yet been adjudicated and are not part of the present proceeding.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

EDWIN MEESE III, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS

v.

JACK ABBOTT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Attorney General of the United States and all other petitioners, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 824 F.2d 1166. The opinion of the district court (App., *infra*, 26a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 50a-51a) was entered on July 28, 1987. A petition for rehearing was denied on October 13, 1987 (App., *infra*, 52a). On December 24, 1987, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 10, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

CONSTITUTIONAL PROVISION, REGULATIONS AND PROGRAM STATEMENT INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The pertinent regulations and program statement—28 C.F.R. 540.70 and 540.71 and Bureau of Prisons Program Statement No. 5266.5 (Jan. 2, 1985)—are set forth, in relevant part, as an appendix to the court of appeals' opinion (App., *infra*, 22a-25a).

STATEMENT

This is a nationwide class action brought by federal prisoners in May 1973. The suit challenges the constitutionality of certain regulations and policies of the United States Bureau of Prisons (BOP) governing the receipt of publications by federal inmates. Numerous federal officials responsible for enforcing those regulations and policies were sued in both their official and individual capacities. In September 1978, the district court ordered the addition, as plaintiffs, of three publishers whose magazines had been rejected at federal prisons: the Prisoners' Union, Weekly Guardian Associates, and the Revolutionary Socialist League (App., *infra*, 2a). On September 13, 1984, following a 10-day bench trial, the district court entered an order upholding the challenged regulations and policies (*id.* at 26a-48a). The court of appeals reversed (*id.* at 1a-25a), holding that the district court had applied an erroneous standard of review, and that under the correct standard—strict scrutiny—the regulations were unconstitutional on their face.¹

¹ In addition to resolving respondents' equitable claims involving restrictions on publications, the courts below also adjudicated re-

1. a. Under the BOP's regulations, inmates are ordinarily entitled to "subscribe to or to receive publications without prior approval" (28 C.F.R. 540.70(a)).² A publication may be withheld from a prisoner only upon the decision of the warden (28 C.F.R. 540.70(b)), and only if the warden finds that the publication would be "detrimental to the security, good order, or discipline of the institution or [that] it might facilitate criminal activity" (28 C.F.R. 540.71(b)). The warden must review the individual publication before rejecting it; he may not simply establish "an excluded list of publications" (28 C.F.R. 540.71(c)). Moreover, the warden may not reject a publication "solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant" (28 C.F.R. 540.71(b)). Publications that a warden may reject include those that meet one of seven specified criteria.³ The regulations also

spondents' challenges to various regulations restricting inmate correspondence. The district court enjoined petitioners from enforcing certain of those regulations, a ruling not appealed by the government, but it upheld the BOP's regulation governing inmate-to-inmate correspondence (App., *infra*, 34a-43a, 47a-48a). The court of appeals affirmed the latter ruling (*id.* at 3a-6a); accordingly, no issue involving inmate correspondence is raised in this petition. Similarly, no issue is raised with respect to individual damage claims brought by 82 named plaintiffs as part of this case. Those claims were severed by the district court in October 1979 (*id.* at 26a n.1) and are still pending.

² The regulations define "publication" as "a book (for example, novel, instructional manual), or a single issue of a magazine or newspaper, plus such other materials addressed to a specific inmate as advertising brochures, flyers, and catalogues" (28 C.F.R. 540.70(a)).

³ Those criteria (with brackets reflecting portions that have not been challenged by respondents) are as follows (28 C.F.R. 540.71(b)):

(1) [It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;]

contain procedures for providing notice and an explanation to the inmate if a publication is rejected and for enabling inmates and publishers to file administrative appeals.⁴ Finally, although it is not set out in the regulations, the BOP's practice is that when any portion of a publication is deemed excludable, the entire publication is withheld (App., *infra*, 34a).

(2) It depicts, encourages, or describes methods of escape from correctional facilities, [or contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions;]

(3) [It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;]

(4) [It is written in code;]

(5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;

(6) It encourages or instructs in the commission of criminal activity;

(7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

In addition to these criteria, the standards governing sexually explicit publications are contained in BOP Program Statement No. 5266.5 (Jan. 2, 1985) (see App., *infra*, 24a-25a).

⁴ Under 28 C.F.R. 540.71(d), the warden must "promptly advise the inmate in writing of the decision [rejecting a publication] and the reasons for it." The notice must refer to "the specific article(s) or material(s) considered objectionable" (*ibid.*). The inmate shall be permitted to review the material for purposes of filing an administrative appeal (see 28 C.F.R. 542.15) "unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity" (28 C.F.R. 540.71(d)). The regulations also provide that the warden shall send a copy of the inmate's notice to the publisher or sender of the publication (28 C.F.R. 540.71(e)). Furthermore, the warden is required to "advise the publisher or sender that he may obtain an independent review of the rejection by writing to the Regional Director within 15 days of receipt of the rejection letter" (*ibid.*).

b. At trial, respondents presented the testimony of various present and former state correctional officials, correctional experts, and federal prisoners. Those witnesses offered their opinions concerning the need for the BOP's regulations at issue. In addition, respondents offered into evidence 46 publications that had been rejected at various federal prisons.

Petitioners introduced the testimony of several federal correctional officials, a state correctional official, and a social scientist who headed the BOP's training program. Those witnesses similarly offered their opinions concerning the need for the BOP's regulations.

At the conclusion of the trial, the district court took the case under advisement and directed the parties to submit proposed findings of fact and conclusions of law. On September 13, 1984, the court issued a lengthy opinion setting forth its findings of fact and conclusions of law. Based on the evidence at trial and the governing case law, the court held that the BOP's regulations and policies represented a reasonable response to legitimate penological concerns and were therefore constitutional (App., *infra*, 28a-32a, 43a-47a).

In its opinion, the court found that at higher-security federal prisons, "minimizing violence is a primary concern" (App., *infra*, 28a). The court noted that the problem has been "aggravated" in recent years by "the growth [in prisons] of ethnic gangs," which "engage in organized crime including extortion, drug activity, and homicide" (*ibid.* (footnote omitted)). In addition, the court indicated that homosexual behavior, while prohibited in federal prisons, is "widespread in the male prisons," and that "[m]any assaults on fellow inmates are precipitated by or manifested in homosexual activity" (*ibid.*).

Addressing the link between publications and security problems, the court found that "publications can present a

security threat" (App., *infra*, 31a). After summarizing the types of publications that have been rejected at federal prisons (*id.* at 29a),⁵ the court noted that not only "racial publications but materials concerning prison management and prison life" frequently "speak in strident, inflammatory terms," and that "a warden might well find such publications too provocative for his institution at a given time" (*id.* at 31a). In addition, the court noted, "[o]ther publications too might be dangerous to have on hand in a particular facility" (*ibid.*). For example, "a sexual magazine * * * might be undesirable in an institution that has had a high incidence of sexual assault" (*ibid.*). According to the court, "[t]he possible dangerous situations are as various as publications and circumstances at given institutions" (*ibid.*).

The district court held that the BOP's regulations were reasonable because they were directed at "potentially volatile publications" and because they did not contain a "blanket ban" on publications but instead provided for a "case-by-case determination" of acceptability (App., *infra*, 47a). The court further held that, in light of the differences in circumstances at different times and among different institutions, the BOP was justified in adopting "a

⁵ According to the court, such publications include "sexually explicit" publications, "non-explicit homosexual publications," publications that "preach ethnic superiority, such as the newsletter of the American Nazi Party," publications that "advocate the unionization of prisoners, highlight instances of alleged abuse by prison officials, or state grievances of prisoners generally," publications that "facilitate gambling by giving odds for the week's sporting events," publications relating to "self-defense," and "instructional materials on electronics and radio" (App., *infra*, 29a (footnote omitted)). The court stated that "[m]agazines and journals are not excluded by title but are reviewed on an issue-by-issue basis" (*ibid.*).

standard that gives the warden wide discretion" (*id.* at 31a).

The court rejected respondents' argument that under *Procunier v. Martinez*, 416 U.S. 396 (1974), the burden was on petitioner to show that the regulations furthered an important government interest and were not unnecessarily broad (App., *infra*, 43a-44a). The court pointed out that in several post-*Martinez* cases,⁶ the Supreme Court had applied a more deferential standard — *i.e.*, whether there is a rational relationship between the prison regulations and legitimate penological objectives (*id.* at 44a-47a). The court noted (*id.* at 47a) that heightened scrutiny was not required simply because various publishers had joined in challenging the regulations. It reasoned that *Martinez* did not apply because, unlike in that case, "the rights of [the outsiders] are not 'inextricably meshed' with those of inmates" (*id.* at 46a & n.16 (quoting 416 U.S. at 409)). Moreover, the court found that the standard proposed by respondents, which required a "'likely,' 'immediate,' or 'substantial' threat," could lead to the "admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder" (App., *infra*, 32a (footnote omitted)).

The court also rejected respondents' contention that the reasons given by prison officials for rejecting the 46 publications introduced at trial were not sufficiently clear or precise (App., *infra*, 32a-33a). The court noted that, while the reasons given did not refer to specific prison risks, the government's witnesses "testified * * * that it is unwise to inform inmates of conditions that cause security

⁶ *Pell v. Procunier*, 417 U.S. 817 (1974); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Bell v. Wolfish*, 441 U.S. 520 (1979).

concerns in the warden" (*id.* at 33a). Finally, the court upheld the BOP's policy of rejecting an entire publication if a portion is found to be excludable (*id.* at 34a).

2. The court of appeals reversed the district court and held that the challenged portions of the BOP's publication regulations were unconstitutional on their face (App., *infra*, 6a-21a). While the court did not dispute the district court's finding that the regulations passed muster under a reasonableness standard, the court held that, because the case deals "with some aspect of the First Amendment rights of a non-inmate, and * * * with the expression of ideas on paper," the strict scrutiny standard adopted in *Martinez* was the governing standard (*id.* at 7a-8a). The court found that this Court's post-*Martinez* decisions applying a more deferential standard were distinguishable because those cases dealt with "conduct within the prison, rather than the content of expression" (*id.* at 12a).

The court stated that, under *Martinez*, the proper test was whether a publication "encourage[s] conduct which would constitute, or otherwise [is] likely to produce, a breach of security or order or an impairment of rehabilitation" (App., *infra*, 20a). The court found that the BOP's regulations were deficient under that test because they permitted "a far looser causal nexus between expression and proscribed conduct" (*id.* at 15a). The court also struck down the BOP's policy of withholding an entire publication if a portion is deemed excludable (*id.* at 16a-17a).

The court remanded the case to the district court to rule, under a strict scrutiny standard, on whether the BOP had acted lawfully in rejecting the 46 publications that respondents had introduced at trial (App., *infra*, 21a).⁷

⁷ The court noted that, because some of the rejections occurred in 1977, "the district court should determine whether and to what extent the individual rejections are moot" (App., *infra*, 21a). In addition, the

REASONS FOR GRANTING THE PETITION

The court of appeals has seriously erred in holding that the BOP's regulations are subject to strict scrutiny review. In a line of cases culminating most recently in *O'Lone v. Estate of Shabazz*, No. 85-1722 (June 9, 1987), and *Turner v. Safley*, No. 85-1384 (June 1, 1987), this Court has made clear that a prison regulation that impinges on a prisoner's constitutional rights is valid if it is "reasonably related to legitimate penological interests" (*Shabazz*, slip op. 5-6 (quoting *Turner*, slip op. 9)). In rejecting that standard, the court of appeals relied entirely on this Court's decision in *Procunier v. Martinez*, 416 U.S. 396 (1974). But as we explain below, *Martinez* was a narrow decision based on the substantial impact of particular regulations on the rights of a unique category of nonprisoners. That decision is not applicable in the present case, which involves at best an incidental impact on publishers. Indeed, this Court has declined to apply the *Martinez* standard in every subsequent case raising a challenge to prison regulations. See *O'Lone v. Estate of Shabazz*, *supra*; *Block v. Rutherford*, 468 U.S. 576 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Pell v. Procunier*, 417 U.S. 817 (1974); cf. *Turner*, slip op. 13-14, 17 (applying deferential standard to regulations governing inmate-to-inmate correspondence but leaving open question whether *Martinez* applies to regulations restricting marriages between inmates and outsiders).

court of appeals analyzed, for illustrative purposes, the reasons given by wardens for rejecting five of the publications at issue. The court held that, in each case, the statements could not "be deemed findings of an adequate causal nexus between a rejected publication and a breach of security or order or interference with rehabilitation" (*id.* at 17a-20a).

The present case is of great practical significance to the BOP because of its effect on the already difficult job of administering the federal prison system. As this Court recently recognized, "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration" (*Turner*, slip op. 9). The district court in the present case specifically found as a factual matter that publications can threaten prison security even when prison officials cannot justify rejection under a strict scrutiny standard (App., *infra*, 32a). Furthermore, because this is a nationwide class action involving all federal prisoners, the BOP will not have the opportunity to seek "adjudication by a number of different courts and judges." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The court of appeals' decision, if not overturned, will apply to every federal prison in the country. For these reasons, review by this Court is plainly warranted.

1. This Court has recognized that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the Legislative and Executive Branches of Government" (*Turner*, slip op. 5). An "essential" objective in running a prison is "maintaining institutional security and preserving internal order and discipline" (*Wolfish*, 441 U.S. at 546). To carry out that goal, prison officials must be given "wide-ranging deference" in pursuing legitimate penological concerns (*Prisoners' Union*, 433 U.S. at 126). Judicial deference is essential "not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge" (*Wolfish*, 441 U.S. at 548), but also because of "separation of

powers concerns" (*Turner*, slip op. 5). In addition, deference is appropriate because of the unique characteristics of penal institutions. Prisons are "closed societies populated by individuals who have demonstrated their inability, or refusal, to conform their conduct to the norms demanded by a civilized society" (*Prisoners' Union*, 433 U.S. at 137 (Burger, C.J., concurring)). For that reason, "rules far different from those imposed on society at large must prevail within prison walls," and judges "are not equipped by experience or otherwise to 'second guess' the decisions" of legislators or administrators "except in the most extraordinary circumstances" (*ibid.*).

In recognition of these principles, this Court has stated that, while "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison" (*Wolfish*, 441 U.S. at 545), imprisonment " 'brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' " *Shabazz*, slip op. 5 (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)). The Court has therefore refused, "even where claims are made under the First Amendment, to 'substitute [its] judgment on * * * difficult and sensitive matters of institutional administration' for the determinations of those charged with the formidable task of running a prison" (*Shabazz*, slip op. 10 (citation omitted)). Under this Court's decisions, "prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights" (*id.* at 5, citing *Prisoners' Union*, 433 U.S. at 128).

Only once has this Court applied heightened scrutiny in ruling on First Amendment challenges to prison regula-

tions. In *Procunier v. Martinez*, 416 U.S. 396 (1974), the Court struck down prison regulations restricting correspondence between inmates and outsiders. The Court held that strict scrutiny was required in that case because the First Amendment rights of nonprisoners were involved (*id.* at 408, 413-414). The decision, however, was a very narrow one. The Court emphasized that the outsiders had a special interest in communicating with specific prisoners (*id.* at 408). To illustrate the point, the Court noted that "[t]he wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him" (*id.* at 409).

Significantly, the Court in *Martinez* stated that the decision in that case applied only to "direct personal correspondence between inmates and those who have a particularized interest in corresponding with them" (*id.* at 408 (footnote omitted)). The Court noted that "[d]ifferent considerations may come into play in the case of mass mailings" (*id.* at 408 n.11), and it "intimate[d] no view" as to the proper resolution of that issue (*ibid.*), which is the issue presented in this case.

2. In the present case, the court of appeals concluded that the *Martinez* standard was controlling, despite the *Martinez* Court's refusal to extend its analysis to cases such as this one. According to the court of appeals (App., *infra*, 7a-8a), *Martinez* is dispositive because both that case and this one "deal with some aspect of the First Amendment rights of a non-inmate, and both deal with the expression of ideas on paper and not with conduct qua expression." Contrary to the court's holding, however, *Martinez* is not controlling here. In relying on *Martinez* and paying insufficient attention to the Court's later decisions, the court of appeals "got off on the wrong foot * * * by

not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement" (*Prisoners' Union*, 433 U.S. at 125).

The court of appeals' distinction between "the expression of ideas on paper" and "conduct qua expression" finds no support in this Court's decisions. This Court has stated in no uncertain terms that all claims by inmates that prison regulations violate their constitutional rights must be reviewed under a reasonableness standard. See *Shabazz*, slip op. 5-6; *Turner*, slip op. 9. Indeed, several cases applying a reasonableness test clearly involve restrictions on "the expression of ideas on paper." See *Turner v. Safley*, *supra* (upholding restrictions on inmate-to-inmate correspondence); *Jones v. North Carolina Prisoners' Labor Union*, *supra* (upholding, inter alia, the receipt by prisoners of bulk mailings about unions); *Bell v. Wolfish*, *supra* (upholding rule restricting prisoners' receipt of hard-back books, except where such books are mailed directly from publishers, book clubs, or book stores). We know of no decision by this Court that supports the court of appeals' conclusion that heightened scrutiny applies in reviewing prison regulations simply because ideas expressed on paper are involved.

The court of appeals is equally incorrect in holding that, under *Martinez*, strict scrutiny is required because the rights of nonprisoner publishers are involved. To begin with, there is a critical distinction between the rights at stake in *Martinez* and those of the outsiders here. *Martinez* involved personalized correspondence from individuals, such as family members and friends. Substantial restrictions on such correspondence would greatly undermine the ability of the outsider to communicate with an inmate. In the case of publishers, however, the "rights"

at stake are far less substantial. Unlike correspondents, a publisher and a reader do not engage in "personal" communication (*Martinez*, 416 U.S. at 408), and a publisher has no "particularized interest" (*ibid.*) in distributing its publication to any individual reader. Moreover, the regulations at issue affect publishers in only the most indirect way. They do not prohibit a publisher from printing a particular article or distributing it to the general public. Rather, out of a universe of potential readers, the regulations simply reduce the potential audience for a particular issue of a publication by preventing a specific institution from receiving it at a particular time. The court of appeals did not even attempt to explain how the interests of the publishers are comparable to the interests of the non-prisoners in *Martinez*.

Moreover, this Court's post-*Martinez* decisions refute the suggestion that an impact on outsiders, however indirect, triggers strict scrutiny review. In numerous cases, the Court has upheld prison restrictions under a deferential standard of review, even though the constitutional rights of outsiders were involved. For example, in *Block v. Rutherford*, *supra*, the Court upheld a blanket prohibition on contact visits on the ground that there was a "valid, rational connection" between the ban and the "internal security of a detention facility" (468 U.S. at 586). Significantly, the respondent in that case, relying on *Martinez*, had argued for heightened scrutiny on the ground that the rights of outsiders were involved (*Rutherford* Resp. Br. 32). Similarly, in *Pell v. Procunier*, *supra*, the Court applied a reasonableness standard and upheld a regulation prohibiting face-to-face media interviews with individual inmates. That regulation, of course, had a direct and immediate impact on members of the press and the public at large. And in *Shabazz*, the Court upheld work assignment rules that had the effect of preventing in-

mates from attending a weekly Muslim congregational service held at the prison. As petitioners' brief in *Shabazz* revealed (at 17), that religious service was performed by an outside Islamic minister who came into the facility for that purpose. The restriction on the rights of prisoners to attend the service thus implicated the free exercise rights of the minister, and it similarly implicated the concerns of the nonprisoner Islamic community, whose members undoubtedly have an interest in ensuring that fellow Muslims be permitted to worship in accordance with the dictates of their religion (see *Shabazz* Amicus Br. for Imam Jamil Abdullah Al-Amin, *et al.* 2)).⁸ Clearly, all of these cases involved regulations that affected the rights of non-prisoners; yet, in each case the Court applied a deferential standard rather than the "strict scrutiny" test applied in *Martinez*.⁹

⁸ Although the court of appeals purported to deal with all of this Court's post-*Martinez* decisions, it did not discuss, or even cite, the Court's decision in *Shabazz*, which had been rendered six weeks earlier.

⁹ The court of appeals noted (App., *infra*, 8a n.1 (citing cases)) that a number of courts, when faced with a similar issue in the context of state prisons, have applied the *Martinez* standard. But those cases are not helpful in resolving the present controversy. All of the cases cited by the court were rendered prior to this Court's decisions in *Turner* and *Shabazz*. The circuit court decisions cited by the court of appeals do not appear to rely on the rights of outsiders; their holdings are apparently based entirely or primarily on the rights of prisoners. See, e.g., *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1030 (2d Cir. 1985) (applying *Martinez* "to resolve cases involving an inmate's right to receive publications"). As noted, however, in light of *Turner* and *Shabazz*, it is clear that the rights of prisoners must be assessed under a reasonableness standard. See generally *Shabazz*, slip op. 6 n.* (rejecting analytical approach taken in *Abdul Wali*). Moreover, the district court decisions cited by the court of appeals either do not refer to the rights of outsiders or do so without any real analysis. And as the court

In addition, the court of appeals erred by treating prisons as if they were public forums, when they "most emphatically" are not (*Prisoners' Union*, 433 U.S. at 136; see also *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). In a non-public forum, outsiders have no generalized right to engage in First Amendment activity. See, e.g., *Greer v. Spock*, 424 U.S. 828, 838-840 (1976) (upholding regulations prohibiting demonstrations and partisan political speeches on military bases and barring distribution of publications deemed clearly detrimental to the functioning of the base); *Adlerley v. Florida*, 385 U.S. 39, 47-48 (1966) (rejecting argument that demonstrators have First Amendment rights to speak and protest within a jail facility); cf. *Hazelwood School District v. Kuhlmeier*, No. 86-836 (Jan. 13, 1988), slip op. 6 (noting that "public schools do not possess all of the attributes of streets, parks, and other

of appeals acknowledged, there is language in various Fifth Circuit cases that the standard applicable to regulations governing publications may be lower than the *Martinez* standard (see App., *infra*, 8a n.1 (citing cases)).

In *Brooks v. Seiter*, 779 F.2d 1177 (1985), a case not cited by the court of appeals, the Sixth Circuit discussed the rights of nonprisoner publishers, noting that it could "perceive no principled basis for distinguishing publications specifically ordered by a prison inmate from letters written to that inmate for purposes of first amendment protection" (*id.* at 1181). According to the court, "[t]he sender's interest in communicating the ideas in the publication corresponds to the recipient's interest in reading what the sender has to say" (*id.* at 1180). In our view, that analysis is erroneous; as noted, there are important differences between personal correspondence and publications. In any event, the Sixth Circuit did not explicitly adopt a strict scrutiny standard, but simply held that the district court had erred in dismissing an inmate's complaint. Indeed, the court quoted *Wolfish* for the proposition that prison officials must be given "wide-ranging deference" in executing policies they deem necessary for prison security (*id.* at 1181 (quoting 441 U.S. at 547)).

traditional public forums"). Furthermore, in a non-public forum, distinctions that "may be impermissible in a public forum" are "inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended use of the property" (*Perry*, 460 U.S. at 49). Under this Court's forum cases, since the BOP's regulations at issue seek to limit the publishers' rights to distribute publications in the non-public forum of a prison, they pass constitutional muster if they are "reasonable in light of the purpose which the forum at issue serves" (*ibid.* (footnote omitted)). That standard, of course, is the same one that, under *Turner* and *Shabazz*, is applicable in evaluating inmates' constitutional claims.

3. The court of appeals, by applying an erroneous standard of review, has invalidated several portions of the BOP's regulations governing publications.¹⁰ Unless it is overturned, the decision in this nationwide class action will undermine the efforts of prison officials to maintain security by withholding publications that, in their professional opinion, could lead to violence or disorder. The evidence at trial revealed that prison violence is a serious

¹⁰ The court upheld certain portions of the regulations that were not challenged by respondents (see App., *infra*, 15a; note 3, *supra*). We agree with the court that the regulations should be evaluated on a section-by-section basis and need not be declared either constitutional or unconstitutional in their entirety. Cf. *Prisoners' Union*, 433 U.S. at 138-139 (Stevens, J., concurring in part and dissenting in part). As respondents conceded below, portions of the regulations are constitutional even under strict scrutiny (App., *infra*, 15a). Similarly, a reasonableness standard is not toothless; prison regulations that do not reasonably serve to promote legitimate penological concerns are subject to challenge even under that more lenient standard. Regardless of the test to be applied, then, a court reviewing a facial challenge to a particular set of regulations must examine the individual sections of the regulations separately and determine whether each is justified under the governing standard.

problem, particularly at the higher security facilities (see App., *infra*, 28a). See *Prisoners' Union*, 433 U.S. at 132 ("Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagration."). Yet, while a warden may have a legitimate fear that a particular publication will cause problems, he will rarely be able to prove a *likelihood* of violence or disorder as a result of the admission of a publication. That does not mean that the warden's fears are exaggerated. As the district court specifically found (App., *infra*, 32a), requiring such a high degree of proof "could result in admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder." The recent uprisings by Mariel Cuban prisoners at two federal facilities confirm that information from the outside can, in some circumstances, have grave consequences within a prison. Accordingly, prison officials must be allowed "to take reasonable steps to forestall * * * a threat * * * before the time when they can compile a dossier on the eve of a riot" (*Prisoners' Union*, 433 U.S. at 132 (footnote omitted)).¹¹

¹¹ This is not to suggest that the BOP has excluded large numbers of publications in the past or that it would expect to do so in the future if the decision of the court of appeals were reversed. The number of publications actually withheld under the regulations has been quite small. For example, the BOP advises us that during the one-year period between September 1, 1986, and August 31, 1987, an estimated 1728 publications were withheld by federal prisons out of approximately 1.8 million publications sent to federal inmates. These figures — which are derived from surveys of individual prisons — reveal that, during the sample period, only about one publication was withheld for every 1,000 received by federal prisoners. Yet, while the number of rejected publications is small, the BOP believes that certain publications have a considerable potential for disruptive effect, and

Under the court of appeals' standard of review, the decision whether a publication threatens prison security would in effect shift from prison administrators to the courts. In virtually every case, a prisoner can make a nonfrivolous claim that the publication at issue was improperly withheld under the court's onerous standard of review. Courts would therefore become the "primary arbiters" (*Turner*, slip op. 9) of the kinds of publications that belong in a prison. That is precisely the kind of result that this Court has repeatedly sought to prevent.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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FEBRUARY 1988

that it must retain the right to reject publications without having to satisfy a strict scrutiny test of the sort imposed by the court of appeals.

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 84-5718
(Civil Action No. 73-01047)

JACK ABBOTT, ET AL., APPELLANTS

v.

EDWIN MEESE, III, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL.*

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA**

July 28, 1987

Before: EDWARDS and RUTH BADER GINSBURG, Circuit
Judges, and FAIRCHILD, Senior Circuit Judge, United
States Court of Appeals for the Seventh Circuit.**

Opinion for the Court filed by Senior Circuit Judge
FAIRCHILD.

* The complaint, filed in 1973, names as its first defendant Elliot Richardson, individually and as Attorney General of the United States. Insofar as he was sued in his official capacity, his successors in office from time to time have been automatically substituted by operation of FEDERAL RULE OF CIVIL PROCEDURE 25(d)(1), including the present Attorney General, the Honorable Edwin Meese, III. Other defendants are the Director of the Federal Bureau of Prisons, and a number of others, individually and as wardens of federal prison facilities.

** Sitting by designation pursuant to 28 U.S.C. § 294(d).

(1a)

FAIRCHILD, Senior Circuit Judge.

This action involved, among other things, regulation of correspondence between inmates of different prisons, and rejection of publications directed to inmates. Named plaintiffs were prisoners and former prisoners suing on behalf of themselves and all other prisoners in federal institutions. On June 7, 1974, the district court ordered that the action be maintained as a class action, except for determining the question of damages, and that the class consist of all current and future prisoners. On September 1, 1978, on plaintiff's [sic] motion, the district judge ordered the addition, as plaintiffs, of the Prisoners' Union, Weekly Guardian Associates, and the Revolutionary Socialist League, publishers of publications which had been rejected at federal prisons.

On September 13, 1984, after trial, the district court filed a decision, and ordered defendants permanently enjoined from applying certain regulations, but granted judgment for defendants in all other respects. Plaintiffs and defendants appealed from the portions of the judgment adverse to them. Defendants' appeal, however, was later dismissed on their motion. Individual damage claims had been "severed" before trial. Assuming that the existence of unresolved damage claims deprives the judgment of finality, we have jurisdiction under 28 U.S.C. § 1292(a)(1) since the order refused injunctions sought by plaintiffs.

In arguing the appeal, plaintiffs have not challenged all the portions of the judgment adverse to them. The issues argued relate to a general prohibition, with certain exceptions, of inmate-to-inmate correspondence, and censorship of publications directed to inmates.

I. PROHIBITION ON INMATE-TO-INMATE CORRESPONDENCE.

The regulation relating to correspondence between inmates, 28 C.F.R. § 540.17 (1986), reads as follows:

An inmate may be permitted to correspond with an inmate confined in any other penal or correctional institution, providing the other inmate is either a member of the immediate family, or is a party or a witness in a legal action in which both inmates are involved. The Warden may approve such correspondence in other exceptional circumstances, with particular regard to the security level of the institution, the nature of the relationship between the two inmates, and whether the inmate has other regular correspondence. The following additional limitations apply:

(a) Such correspondence at institutions of all security levels may always be inspected and read by staff at the sending and receiving institutions (it may not be sealed by the inmate);

(b) The Wardens of both institutions must approve of the correspondence.

Although the language is permissive in form, the record indicates that the regulation amounts to a prohibition except for correspondence between family members or those involved in a legal action.

The district court upheld the regulation, writing as follows:

The plaintiffs contend that the general ban on prisoner-to-prisoner correspondence destroys prisoner relationships, thus working a hardship on inmates and prohibiting a potentially rehabilitative activity. As on the publications issues, the plaintiffs

point to state systems which have liberal policies but find no adverse results.

They argue that inmate "grapevines" are usually strong enough to relay information between prisons without the benefit of mail privileges, rendering the ban on written communication useless and therefore unduly restrictive.

The defendants respond that prisoner-to-prisoner mail could be used for communication between members of prison gangs: in particular it could be used to arrange assaults on inmates who are transferred under the Bureau's protective custody program. Testimony on the conduct of prison gangs indicated that this is not a remote possibility. There was evidence, too, that prisoners have succeeded in sending letters to one another in order to carry on drug transactions and formulate escape plans. The plaintiffs suggest that the risk of such problems could be handled by monitoring correspondence; but the defendants reply that they could not hope to monitor a sufficient number of letters, and in any event, prisoners could easily write in private jargon that prison authorities would not understand. Thus no less restrictive policy than a general ban on inter-inmate correspondence is in the interest of security. The court sustains this position. Again, as in the case of publications, the Bureau is not obliged to take risks other systems accept, nor is it required to forego controlling one means of communication where it cannot all means.

The Supreme Court recently upheld a very similar prohibition in *Turner v. Safley*, ____ U.S. ____, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). *Turner* clearly controls this point, with one possible exception.

The regulation considered in *Turner* permits correspondence "concerning legal matters," but the regulation before us is more restrictive, permitting an inmate to correspond with another inmate who "is a party or a witness in a legal action in which both inmates are involved."

Plaintiffs challenge the regulation on the ground that it prevents inmates from seeking and obtaining legal assistance from other inmates. This argument rests upon the inmates' "constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821, 97 S.Ct. 1491, 1494, 52 L.Ed.2d 72 (1977).

In *Johnson v. Avery*, 393 U.S. 483, 490, 89 S.Ct. 747, 751, 21 L.Ed.2d 718 (1969), the Supreme Court held that "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation . . . barring inmates from furnishing such assistance to other prisoners." See *Rudolph v. Locke*, 594 F.2d 1076, 1078 (5th Cir. 1979). *Johnson* was extended to assistance in civil rights actions in *Wolff v. McDonnell*, 418 U.S. 539, 577-80, 94 S.Ct. 2963, 2985-86, 41 L.Ed.2d 935 (1974). 430 U.S. at 828, 97 S.Ct. at 1498. As suggested by the *Johnson* language, there is no absolute right to the assistance of another inmate if a reasonable alternative is provided.

It has been held that where an adequate method of access is provided, an inmate may not insist on the right to the assistance of a particular inmate. *Gomez v. Henman*, 807 F.2d 113, 116 (7th Cir.1986); *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir.1981).

The Bureau has several regulations pertaining to "Inmate Legal Activities" 28 C.F.R. § 543.10-.16. Defendants point out a provision requiring each Warden to establish an inmate law library and procedures for access to legal reference materials and to legal counsel, and for the

preparation of legal documents. Section 543.15 governs legal aid programs which are funded or approved by the Bureau. Section 543.11(f) provides that unless the institution has an active, ongoing legal aid program, the Warden shall allow an inmate the assistance of another inmate during leisure time.

If, in fact, the Bureau failed to provide resources and assistance sufficient to fulfill an inmate's right to meaningful access to the courts without the assistance of inmates in other institutions by correspondence, an amendment to the prohibition of correspondence would be required. The record, however, does not establish the lack of a reasonable alternative.

II. REJECTION OF PUBLICATIONS

The Bureau of Prisons has issued regulations delegating to each warden authority to reject a publication to which an inmate has subscribed or which has been otherwise sent to him. Generally the warden may reject a publication only if it is determined "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." 28 C.F.R. § 540.71(b) (1986). The regulation also sets forth a non-exhaustive list of criteria, and a publication which meets one of them "may" be rejected. Rejection by the warden is subject to appeal within the Bureau of Prisons. We set forth in an Appendix the governing regulations, 28 C.F.R. § 540.70 and § 540.71(b), (c), (d), and (e), as well as a portion of a Bureau Program Statement No. 5266.5 which contains updated additional instructions dealing with sexually explicit material.

Plaintiffs challenge on First Amendment grounds parts of § 540.71(b) and the Program Statement facially and as applied. They seek a specific determination on 46 rejected

publications. "[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495 (1974). The freedom of the inmates to receive publications and to read them is at stake. "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily protects the right to receive. . . .'" *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969) (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313 (1943)). More significantly, however, in this area of the law, the regulation causes a restriction on the First Amendment rights of the publishers of the material, including those publishers who are plaintiffs. See *Procunier v. Martinez*, 416 U.S. 396, 409, 94 S.Ct. 1800, 1809, 40 L.Ed.2d 224 (1974), and *Turner*, ___ U.S. at ___, 107 S.Ct. at 2259.

The Supreme Court has not articulated a standard of review to be applied to censorship of content in the exact context presented here. *Martinez*, 416 U.S. at 413, 94 S.Ct. at 1811 comes close. *Martinez* dealt with ideas expressed in correspondence (where here the expressions come to the inmate in published material). *Martinez* dealt with inter-personal communication between inmates and non-inmates, and emphasized protection of the rights of the non-inmate correspondent in two-way communication (where here the communication is in one direction, and not between individuals; the right of the non-inmate being to publish and the right of the inmate being to receive and read). Both *Martinez* and the case at bar deal with some aspect of the First Amendment rights of a non-inmate, and both deal with the expression of ideas on paper and

not with conduct qua expression. We conclude that the *Martinez* standards are applicable here.¹

Stating criteria for justifying censorship of prisoner mail, the *Martinez* Court said,

First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an im-

¹ A number of courts have so held: *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1030 (2d Cir. 1985); *Aikens v. Jenkins*, 534 F.2d 751, 755 (7th Cir. 1976); *Carpenter v. South Dakota*, 536 F.2d 759 (8th Cir. 1976); *Cofone v. Manson*, 409 F.Supp. 1033, 1039 (D.Conn.1976); *Jackson v. Ward*, 458 F.Supp. 546, 558 (W.D.N.Y.1978); *McCleary v. Kelly*, 376 F.Supp. 1186, 1189 (M.D.Pa.1974); *Hopkins v. Collins*, 411 F.Supp. 831, 833 (D.Md. 1975), *reversed in part on other grounds*, 548 F.2d 503 (4th Cir.1977); *Hardwick v. Ault*, 447 F.Supp. 116, 131 (M.D.Ga.1978). See, however, a suggestion that the standards for censorship of publications may be lower than *Martinez*: *Blue v. Hogan*, 553 F.2d 960 (5th Cir.1977); *Guajardo v. Estelle*, 580 F.2d 748, 760 (5th Cir. 1978); cf. *Vodicka v. Phelps*, 624 F.2d 569 (5th Cir.1980).

Although in *Turner*, the Court rejected application of the stricter *Martinez* standard to regulation of correspondence between inmates, we conclude that it did not overrule or restrict *Martinez* as applied to situations where the First Amendment rights of non-inmates are involved.

portant or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.

416 U.S. at 413, 94 S.Ct. at 1811.

Critical to both the *Martinez* holding and our case is the question of the required degree of probability that an expression of an idea will cause conduct destructive of security or order. (Little in our case involves a claimed impairment of rehabilitation.) Turning to that matter, the *Martinez* Court went on:

This does not mean, of course, that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty. But any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interests identified above.

416 U.S. at 414, 94 S.Ct. at 1811. We think it follows that a regulation authorizing censorship must reflect, and in applying the regulation the prison administrator must carry, the burden of showing that the censorship is "generally necessary."²

² See *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (2d Cir.1985); *Morgan v. LaVallee*, 526 F.2d 221, 224 (2d Cir.1975); *Guajardo v. Estelle*, 580 F.2d 748, 760 n.7 (5th Cir.1978); *Vodicka v. Phelps*, 624 F.2d 569, 574 (5th Cir.1980); *Aikens v. Jenkins*, 534 F.2d 751, 755 (7th Cir.1976); *Jackson v. Ward*, 458 F.Supp. 546, 557 (W.D.N.Y.1978); *Hardwick v. Ault*, 447 F.Supp. 116, 131 (M.D.Ga.1978); *Mawby v. Ambroyer*, 568 F.Supp. 245, 251 (E.D.Mich.1983). Cf. *Carpenter v. South Dakota*, 536 F.2d 759 (8th Cir.1976).

The district court, however, concluded that the *Martinez* standards are not applicable to censorship of publications, and placed the burden of proof on plaintiffs. Citing *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977), and *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the court said,

Those cases require the Bureau to articulate a rational relationship between its regulations (and practices) and legitimate penological objectives such as internal security. Once the Bureau meets that requirement, the plaintiffs must show by "substantial evidence" that the defendants have "exaggerated their response" to the problems the regulations address.

The government argues in support of the district court's conclusions. We think these cases dealt with action and conduct occurring or threatened within the prisons and we do not agree that they state the standard for permissible censorship of information and ideas expressed in publications.

The regulation upheld in *Pell v. Procunier* forbade press and other media interviews with specific individual inmates. The Court said, in part,

Although they would not permit prison officials to prohibit all expression or communication by prison inmates, security considerations are sufficiently paramount in the administration of the prison to justify the imposition of some restrictions on the entry of outsiders into the prison for face-to-face contact with inmates.

* * * * *

Such considerations [permitting rehabilitative visitation while keeping visitations at a level which will not

compromise security] are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.

417 U.S. at 827, 94 S.Ct. at 2806.

In distinguishing *Martinez*, the Court stated as follows:

In *Procunier v. Martinez*, *supra*, we could find no legitimate governmental interest to justify the substantial restrictions that had there been imposed on written communications by inmates. When, however, the question involves the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations. So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, "prison officials must be accorded latitude."

417 U.S. at 826, 94 S.Ct. at 2806 (citation omitted).

In *Jones v. North Carolina Prisoners' Union*, the Court upheld actions of prison officials prohibiting inmates from soliciting other inmates to join the Prisoners' Union, barring all meetings of the Union, and refusing to deliver packets of Union publications mailed in bulk to several inmates for redistribution among others. 433 U.S. at 121, 97 S.Ct. at 2535. The prison officials held the view that a prisoners' union would be detrimental to order and security. "It is enough to say they have not been conclusively

shown to be wrong in this view." 433 U.S. at 132, 97 S.Ct. at 2541.

If the appellants' views as to the possible detrimental effects of the organizational activities of the Union are reasonable, as we conclude they are, then the regulations are drafted no more broadly than they need be to meet the perceived threat—which stems directly from group meetings and group organizational activities of the Union. *Cf. Procunier v. Martinez*, 416 U.S. at 412-16, 94 S.Ct. at 1810-13. When weighed against the First Amendment rights asserted, these institutional reasons are sufficiently weighty to prevail.

433 U.S. at 133, 97 S.Ct. at 2541.

Again, as in *Pell v. Procunier*, conduct within the prison, rather than the content of expression, was the critical issue.

Nor does the prohibition on inmate-to-inmate solicitation of membership trench untowardly on the inmates' First Amendment speech rights. Solicitation of membership itself involves a good deal more than simple expression of individual views as to the advantages or disadvantages of a union or its views; it is an invitation to collectively engage in a legitimately prohibited activity. If the prison officials are otherwise entitled to control organized activity within the prison walls, the prohibition on solicitation for such activity is not then made impermissible on account of First Amendment considerations, for such a prohibition is then not only reasonable but necessary.

433 U.S. at 131-32, 97 S.Ct. at 2540-41 (citation omitted).

In *Bell v. Wolfish*, the Court decided that a prohibition against receipt of hardback books unless mailed

directly from publishers, book clubs, or bookstores does not violate the First Amendment rights of MCC inmates. [*sic*: previous sentence not part of 441 U.S. at 550-51] That limited restriction is a rational response by prison officials to an obvious security problem. It hardly needs to be emphasized that hardback books are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons easily may be secreted in the bindings. They also are difficult to search effectively. There is simply no evidence in the record to indicate that MCC officials have exaggerated their response to this security problem and to the administrative difficulties posed by the necessity of carefully inspecting each book mailed from unidentified sources. Therefore, the considered judgment of these experts must control in the absence of prohibitions far more sweeping than those involved here.

441 U.S. at 550-51, 99 S.Ct. at 1880 (citation omitted).

As the Court pointed out, this rule operated without regard to the content of the expression. *Id.* at 551, 99 S.Ct. at 1880.

In *Turner v. Safley*, ___ U.S. ___, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), the Court upheld a prison regulation prohibiting correspondence between inmates of different institutions unless they are family members, and struck down a regulation greatly restricting marriage of an inmate. The lower courts had applied *Martinez* to the prohibition on inmate-to-inmate correspondence. The Supreme Court found that reliance improper, saying of *Martinez*,

[O]ur holding therefore turned on the fact that the challenged regulation caused a "consequential restriction on the First and Fourteenth Amendment rights of those who are *not* prisoners." *Id.*, 416 U.S. at 409, 94 S.Ct. at 1809. (emphasis added). We expressly

reserved the question of the proper standard of review to apply in cases "involving questions of 'prisoners' rights.'" *Ibid.*

Id. at ____, 107 S.Ct. at 2260.

After summarizing the decisions which came after *Martinez*, the Court said:

If *Pell*, *Jones* and *Bell* have not already resolved the question posed in *Martinez*, we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.

Id. at ____, 107 S.Ct. at 2261. The Court concluded that the prohibition of correspondence between inmates fulfilled the standard, but the rule on marriage did not.

We find no holding that the tests for prison censorship of a publication on the basis of content, having an impact on the rights of the publishers, are different from those stated in *Martinez*.

If a regulation were to authorize the Warden to reject a portion of a publication only if he found that the material would "encourage" violence, or some other specified type of conduct breaching security or order or in some particular way impairing rehabilitation, we think that regulation could survive the minimum *Martinez* tests. Language in *Martinez* suggests that encouragement would be a sufficient causal nexus between expression and proscribed conduct so that the expression could be rejected.³ A Warden's finding to that effect would be entitled, on review, to deference by reason of his expertise. *Martinez*, 416 U.S. at 405, 414 94 S.Ct. at 1807, 1811; *Pell*, 417 U.S.

³ Whether "encourage," standing alone, sufficiently connotes propelling action or conduct in other First Amendment contexts may be questioned. See *United States v. Dellinger*, 472 F.2d 340, 361 (7th Cir.1972).

at 827, 94 S.Ct. at 2806; *Jones*, 433 U.S. at 126, 97 S.Ct. at 2538; *Bell*, 441 U.S. at 551, 99 S.Ct. at 1880; and *Turner*, ____, U.S. at ____, 107 S.Ct. at 2260. Going beyond minimum constitutional requirements, it would follow that the more pointedly the regulation spelled out a requirement of a specific finding, including reasons therefor, that particular rejected material would very probably produce a specifically described breach of security or order or an impairment of rehabilitation in some particular way, the more likely each rejection would be sustained when challenged in court.

The regulation before us, however, fails to satisfy the minimum *Martinez* test. Although the introductory paragraph of (b) appears at first to limit the Warden's authority to rejecting material "determined detrimental to the security, good order, or discipline of the institution," it goes on to provide: "or if it might facilitate criminal activity." "[M]ight facilitate" permits a far looser causal nexus between expression and proscribed conduct than "encourages." Moreover, the term "detrimental" is susceptible of different meanings and must be interpreted in the light of the fact that the Regulation goes on expressly to authorize rejection of a publication which meets any one of a list of seven criteria, the list being non-exhaustive.

Plaintiffs do not challenge criterion (1) ("depicts or describes procedures for the construction or use of weapons, ammunition, bombs, or incendiary devices"); a portion of (2) ("contains blueprints, drawings or similar description of Bureau of Prisons institutions"); (3) ("depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs"); or (4) ("written in code").

The balance of criterion (2) authorizes rejection of a publication which "depicts, encourages, or describes methods of escape from correctional facilities. Although

"encourages" would suffice as a causal nexus between expression and proscribed conduct, "depicts" and "describes" do not.

Criterion (5) is deficient in several respects. It authorizes rejection of a publication which "depicts, describes or encourages activities which may lead to the use of physical violence or group disruption." Again, "depicts" and "describes" fall short. "Activities" are described as those which "may lead" to physical violence or group disruption. "Group disruption" could mean types of events which are not a breach of security or order or an impairment of rehabilitation.

Criterion (6) authorizes rejection of a publication which "encourages or instructs in the commission of criminal activity." As to that which "instructs" there is no requirement of a finding of a probability that the publication will produce a breach of security or order or an impairment of rehabilitation.

Criterion (7) relating to sexually explicit material should doubtless be read as interpreted or qualified by Bureau Program Statement No. 5266.5. (See Appendix.) Paragraph (a) of the Statement enumerates specific types of sexually explicit material, but it requires no finding of causal nexus between possession of the listed material and breaches of security or order or impairment of rehabilitation.

The Bureau follows the practice of rejecting and returning an entire publication once a portion of it is deemed objectionable. Even assuming that the portion is appropriately rejected under *Martinez* standards, rejection of the balance is not "generally necessary" to protect the legitimate governmental interest involved in the portion properly rejected. Defendant Carlson admitted that there is really no reason for not deleting the offending material and turning over the balance to the inmate, although there

was testimony by some that in their judgment deleting specific portions would generate more discontent than total rejection. The district court found that these fears were reasonably founded. We conclude the finding conflicts with the holding of *Martinez* that prison administrators have the burden of showing that a restrictive practice is "generally necessary." 416 U.S. at 414, 94 S.Ct. at 1812. Thus, this practice of rejecting an entire publication where a part is objectionable is inconsistent with the First Amendment.

At the time of rejection of a publication, the Warden writes to the inmate, informing him of the rejection and the reasons for it. 28 U.S.C. [sic: C.F.R.] § 540.71(d) (1986). The district court did not address particular reasons for rejection, but generally concluded "that the notices normally make the general nature of the warden's objections clear," and that the

explanations are not as articulate as they might be, but neither are they simply restatements of the general standard for excluding publications. Chiefly they lack reference to the circumstances in the prison that support the Warden's decision. At first this is a striking omission, since the Warden's awareness of conditions in his particular facility is the theoretical basis for his wide discretion to reject publications. Defense witnesses testified, however, that it is unwise to inform inmates of conditions that cause security concerns in the Warden. Such a policy could expose weaknesses in prison security to exploitation by inmates. This reasoning the court finds, supports the defendant's practice.

We have not examined every statement of reasons for rejection, but there are some, at least, which cannot be deemed findings of an adequate causal nexus between a re-

jected publication and a breach of security or order or interference with rehabilitation. Examples are:

(1) The publication is the March 21, 1977, issue of *The Call*. The relevant small portion of the issue is an article entitled "Hell holes at Marion Prison-Prisoners expose 'Control Unit'." The story is highly critical of described practices, but is narrative in form. While asserting that "inmates have staged strikes and facts and have continued to struggle against their oppression," it contains no exhortation. The Atlanta warden's comment asserts that the issue

states that prisoners should revolt against the use of control units and further indicates that inhumane treatment is being administered by racist guards, within the Federal Prison System. The inflammatory material contained in this issue of *'The Call'* can present problems in a facility such as ours and is considered not to be in the best interest of discipline, good order and security of the institution.

(2) The same issue was rejected at Marion with the comment,

The . . . Committee believes that this publication is used in part to glorify problem inmates and prison unions which could cause problems to inmates and staff in the security and orderly running of this institution. This publication also [propagates] an adversary attitude by inmates toward staff.

(3) One article in *Labyrinth*, April 1977, was entitled "Medical Murder." It reported two deaths in federal prisons and two in a state prison. Each story related inadequate or improper medical treatment, and concluded that the prisoners, although sentenced to terms, were "in fact

sentenced to death and were murdered by neglect."⁴ (Emphasis in the original.) The letter rejecting this issue of *Labyrinth* explained:

The basis for our decision is that this type of philosophy could guide inmates in this institution into situations which could cause themselves and other inmates problems with the Medical staff.

(4) The September 15-October 14, 1977, issue of *Torch* contained a letter ostensibly from an inmate in a state penitentiary. The writer described hard conditions of prison work and life. It was printed under the title "Slave Labor at Angola Penitentiary." The issue was rejected with the comment,

The article on "Slave Labor at Angola Penn" has as the main theme organization and unity of inmates against correctional institutions. This philosophy guides individual inmates into situations which can cause themselves and other inmates problems with the posted regulations of this institution. Additionally, this type of material on institutions has a tendency to develop an adversary attitude by inmates toward staff, which can cause an unhealthy environment in this institution. This type of attitude is detrimental to the good orderly running of this institution.

(5) A rejection of a magazine in 1981 referred to material by page numbers, saying that it "depicts, describes or encourages activities which may lead to use of physical violence or group disruption." One of defendants conceded in testimony that "it should spell out more specifically the purpose of the rejection."

The Court said in *Martinez*:

This does not mean, of course, that prison administrators may be required to show with certainty

⁴ The complaint in an action brought on account of one of these deaths was considered in *Green v. Carlson*, 581 F.2d 669 (7th Cir.1978), *aff'd*, *Carlson v. Green*, 446 U.S. 14, 100 S.Ct.1468, 64 L.Ed.2d 15 (1980).

that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty.

416 U.S. at 414, 94 S.Ct. at 1811.

In our view, allowing such latitude, none of the comments just quoted constitutes a reasoned determination that the material encouraged conduct which would constitute, or otherwise was likely to produce, a breach of security or order or an impairment of rehabilitation.

The district court did not deal individually with the rejected publications. It wrote,

Examination of the publications before the court confirms the proposition that publications can present a security threat. Not only the racial publications but materials concerning prison management and prison life often speak in strident, inflammatory terms; a warden might well find such publications too provocative for his institution at a given time. Other publications too might be dangerous to have on hand in a particular facility: A sexual magazine, for example, might be undesirable in an institution that has had a high incidence of sexual assault. The possible dangerous situations are as various as publications and circumstances at given institutions.

The court therefore upholds the defendants' position that publications can present a security threat; and it also upholds the adoption of a standard that gives the warden wide discretion.

The court's generalized conclusions concerning the rejected materials logically follow from the court's conclusion that the deferential standards of *Pell*, *Jones*, and *Bell* control, and that plaintiffs had the burden of proving that

defendants have "exaggerated their response" to problems rationally related to legitimate penological objectives. Although plaintiffs' experts testified to the effect that the defendants' rejection policy went further than necessary, the court gave greater weight to the testimony on behalf of defendants.

Our conclusion, however, is that although deference is to be accorded to defendants' expertise, they have the burden of showing that a rejection of a publication is at least "generally necessary to protect one or more of the legitimate governmental interests . . ." of security, order, or rehabilitation. *Martinez*, 416 U.S. at 414, 94 S.Ct. at 1812. It follows that the rejections should have been addressed individually and none upheld unless consistent with *Martinez*.

We note, of course, that some of the rejections occurred as early as 1977. Many of the items were periodicals current at that time. In several instances a defendant testified that in the light of changed circumstances a publication rejected in that period at one institution would not be rejected now. It may well be that there is no longer a real controversy over some of the publications. On remand the district court should determine whether and to what extent the individual rejections are moot. As to those which are not, the court should determine the propriety under *Martinez* of each rejection.

Insofar as the judgment appealed from denied relief on First Amendment grounds from rejection of publications, it is REVERSED and the cause REMANDED for further proceedings consistent with this opinion. In all other respects, the judgment is AFFIRMED. The parties shall bear their own costs on appeal.

ABBOTT APPENDIX

28 C.F.R. § 540.70 (1986).

(a) The Bureau of Prisons permits an inmate to subscribe to or to receive publications without prior approval and has established procedures to determine if an incoming publication is detrimental to the security, discipline, or good order of the institution or if it might facilitate criminal activity. The term publication, as used in this rule, means a book (for example, novel, instructional manual), or a single issue of a magazine or newspaper, plus such other materials addressed to a specific inmate as advertising brochures, flyers, and catalogues.

(b) The Warden may designate staff to review and where appropriate to approve all incoming publications in accordance with the provisions of this rule. Only the Warden may reject an incoming publication.
28 C.F.R. § 540.71(1986).

(b) The Warden may reject a publication only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity. The Warden may not reject a publication solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant. Publications which may be rejected by a Warden include but are not limited to publications which meet one of the following criteria:

(1) [It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;]

(2) It depicts, encourages, or describes methods of escape from correctional facilities, [or contains

blueprints, drawings or similar descriptions of Bureau of Prisons institutions;]

(3) [It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;]

(4) [It is written in code;]

(5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;

(6) It encourages or instructs in the commission of criminal activity;

(7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

* * * * *

(c) The Warden may not establish an excluded list of publications. This means the Warden shall review the individual publication prior to the rejection of that publication. Rejection of several issues of a subscription publication is not sufficient reason to reject the subscription publication in its entirety.

(d) Where a publication is found unacceptable, the Warden shall promptly advise the inmate in writing of the decision and the reasons for it. The notice must contain reference to the specific article(s) or material(s) considered objectionable. The Warden shall permit the inmate an opportunity to review this material for purposes of filing an appeal under the Administrative Remedy Procedure unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity.

(e) The Warden shall provide the publisher or sender of an unacceptable publication a copy of the rejection letter. The Warden shall advise the publisher or sender that he may obtain an independent review of the rejection by writing to the Regional Director within 15 days of receipt of the rejection letter. The Warden shall return the rejected publication to the publisher or sender of the material unless the inmate indicates an intent to file an appeal under the Administrative Remedy Procedure, in which case the Warden shall retain the rejected material at the institution for review. In case of appeal, if the rejection is sustained, the rejected publication shall be returned when appeal or legal use is completed.

The bracketed language in § 540.71(b) is not challenged by the plaintiffs.

Program Statement No. 5266.5 reads, in part, as follows:

(a) A Warden may determine that sexually explicit material of the following types is to be excluded, as potentially detrimental to the security, or good order, or discipline of the institution, or facilitating criminal activity:

(1) Homosexual (of the same sex as the institution population).

(2) Sado-masochistic.

(3) Bestiality.

(4) Involving children.

(b) The following points should be emphasized:

(1) It is the local Warden's decision (except for the child-model materials, which are prohibited by law)—a sexually explicit homosexual publication for example may be admitted if it is determined not to pose a threat at the local institution;

(2) Explicit heterosexual material will ordinarily be admitted;

(3) Sexually explicit material does not include material of a news or information type—publications covering the activities of gay rights organizations or gay religious groups, for example, should be admitted;

(4) Literary publications should not be excluded, solely because of homosexual themes or references, if they are not sexually explicit, and

(5) Sexually explicit material may nonetheless be admitted if it has scholarly value, or general social or literary value.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 73-1047

JACK ABBOTT, ET AL., PLAINTIFFS

v.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

[Filed Sep. 13, 1984]

MEMORANDUM OPINION

This class action, brought by convicted prisoners residing in the United States Bureau of Prisons ("Bureau") facilities, challenges Bureau policies and practices regarding incoming publications and inmate correspondence. The plaintiffs allege violations of the first, fifth, and sixth amendments to the United States Constitution. They are joined in their first amendment claims by publishers of certain materials excluded from federal prisons by one or more of the defendants. All plaintiffs seek declaratory and injunctive relief.¹

The case was tried by this court, sitting without a jury, for ten days in May and June of 1981. The case was submitted on May 3, 1982. Upon consideration of all the evidence, the court now makes the following findings of fact and conclusions of law.

¹ Individual claims for damages were severed by order of this court on October 23, 1979.

I. Findings of Fact²

A. Background

The Bureau of Prisons administers a system of 43 institutions including penitentiaries, camps, medical centers, and short-term detention facilities. The penal institutions are classified on a scale of one to six according to their security. At level one institutions, such as the co-ed facility at Lexington, Kentucky, there are no physical barriers to escape. At the level six institution at Marion, Illinois, escape is made as difficult as possible; and maximum control is exercised over the inmates' activities, their locations throughout the day, and their contact with the outside world.

The federal prisons are considered more "secure" than their state counterparts: that is, subject to fewer violent incidents, fewer escapes, and a lower level of tension in general. The relative security of federal prisons may be partly due to such factors as a better educated staff, a better staff-to-inmate ratio, and better funding. It may also be attributed to the higher prevalence of "white-collar" criminals in the federal systems; but as Bureau Director

² Many of the policies and practices challenged by the plaintiffs were abandoned during the eight-year period preceding the trial. The plaintiffs seek an order preventing the defendants from reinstating these policies and practices. With one exception, however, it does not appear that reinstatement is threatened. The court therefore addresses only the regulations and practices of the Bureau as they now stand. See *Ass'd Third Class Mail Users v. U.S. Postal Service*, 662 F.2d 767, 769-70 (D.C. Cir. 1980).

The exception is a proposed amendment to the "publishers-only" rule. When this litigation began, inmates could only receive publications directly from publishers. Some years prior to trial the Bureau limited this restriction to hard-cover publications. It now proposes to extend the rule to newspapers. 49 Fed. Reg. 20432 (May 14, 1984). As the proposal has not been litigated in this case, it would be inappropriate to address it here.

Norman Carlson testified,³ that distinction can be somewhat overdrawn. Many federal inmates are convicted of non-violent, white-collar crimes but nevertheless have violent histories. Moreover, the populations of federal and state institutions are not entirely discrete: many state inmates were once federal inmates, and vice versa; in some cases, in fact, state prisoners are transferred to the federal system where they can be controlled more effectively. Finally, while there are 25,000 inmates in federal prisons, the more dangerous offenders are concentrated in the higher-security facilities at levels 4-6.

At the higher-security institutions, where there are aggressive individuals in a crowded, restrictive, and adversarial environment, minimizing violence is a primary concern. In recent years the problem has been aggravated by the growth of ethnic gangs (e.g., the Mexican Mafia, the Aryan Brotherhood, the Black Guerrilla Family) in the federal system. The gangs, which are more firmly established in state systems, engage in organized crime including extortion, drug activity, and homicide.⁴ A second factor that compounds the violence problem is homosexuality. While homosexual behavior is prohibited in the federal prisons, it is widespread in the male prisons and tolerated to a degree that varies with the institution. Many assaults on fellow inmates are precipitated by or manifested in homosexual activity.

B. Publications

1. *Standards for exclusion.* Federal prisoners are permitted to subscribe to and receive publications without prior approval. 28 C.F.R. § 540.70. Each publication, however, may be withheld from the inmate and returned

³ Transcript (Tr.) at 942.

⁴ As of 1979 the Bureau was able to trace eight homicides in its institutions to gang activity. Defendants' Exhibit 13.

to the publisher if the warden determines it "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." *Id.* The kinds of publications that wardens have excluded under this standard include sexually explicit homosexual and heterosexual magazines; non-explicit homosexual publications (i.e., gay rights material); publications that preach ethnic superiority, such as the newsletter of the American Nazi Party; publications that advocate the unionization of prisoners, highlight instances of alleged abuse by prison officials, or state grievances of prisoners generally;⁵ journals that facilitate gambling by giving odds for the week's sporting events; self-defense publications such as *Lethal Unarmed Combat*; and instructional materials on electronics and radio. Magazines and journals are not excluded by title but are reviewed on an issue-by-issue basis.

The parties agree that the standard "detrimental to the security, good order, or discipline of the institution" confers broad discretion on the warden. That discretion is not appreciably limited by the "criteria" and "guidelines" contained in Bureau regulations. The criteria include such generalized descriptions of excludable publications as the following:

(2) It depicts, encourages, or describes methods of escape from correctional facilities . . . ;

(5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;

⁵ One journal in evidence, for example, contains an article on prison medical care entitled "Medical Murder." Plaintiffs' Exhibit 18. Also in evidence is a calendar containing a rather intellectual set of "statements on the prison experience." Plaintiffs' Exhibit 29. The media plaintiffs publish prisoner union material and articles critical of prisons (on the order of "Medical Murder").

(6) It encourages or instructs in the commission of criminal activity. [28 C.F.R. § 540.71(b).]

These categories are part of a non-exhaustive list. The "guidelines" are the outgrowth of a lawsuit brought by the National Gay Task Force and pertain to sexually oriented publications. The guidelines give special protection to "news or information type" publications, such as newsletters "covering the activity of gay rights organizations," but essentially leave sexually explicit material to be judged under the "security, good order, or discipline" standard. Plaintiffs' Exhibit 4 at 2-3.⁶

The plaintiffs' experts testified that prison wardens do not need this broad discretion to exclude publications. Some of the witnesses asserted that there is no reason to believe publications ever pose a threat to security. They pointed out that there is no empirical evidence of a link between publications and prison disorder, and that some state prisons admit publications freely without incident. The defendants produced a study to show that the pres-

⁶ The full text of the guidelines reads as follows:

(a) A Warden may determine that sexually explicit material of the following type is to be excluded, as potentially detrimental to the security, or good order, or discipline of the institution, or facilitating criminal activity:

1. Homosexual (of the same sex as the institution population).
2. Sado-masochistic.
3. Bestiality.
4. Involving children.

(b) The following points should be emphasized:

1. It is the local Warden's decision (except for child-model materials, which are prohibited by law)—a sexually explicit homosexual publication for example may be admitted if it is determined not to pose a threat at the local institution;

2. Explicit heterosexual material will ordinarily be admitted.

ence of some publications in prison—specifically, homosexual literature—does lead to violence; more persuasive, however, was the testimony of the plaintiffs' witnesses themselves. One witness conceded that publications which preach ethnic superiority "would be sufficiently inflammatory so that there might be some problems with [them]."⁷ Another witness agreed and also testified that it would be a "bad idea" to admit gambling publications, gambling debts being a common source of assaults.⁸

Examination of the publications before the court confirms the proposition that publications can present a security threat. Not only the racial publications but materials concerning prison management and prison life often speak in strident, inflammatory terms; a warden might well find such publications too provocative for his institution at a given time. Other publications too might be dangerous to have on hand in a particular facility: a sexual magazine, for example, might be undesirable in an institution that has had a high incidence of sexual assault. The possible dangerous situations are as various as publications and circumstances at given institutions.

The court therefore upholds the defendants' position that publications can present a security threat; and it also upholds the adoption of a standard that gives the warden wide discretion. The defendants concluded that a less generalized regulation would be underinclusive: that is, it could foreclose a warden from excluding a potentially disruptive publication. While it might be better policy to take that risk and enjoy the benefits of more uniform and more liberal admission of publications, the plaintiffs have not shown that such a policy is required. As the defendants argued, the difference between institutions and the changing nature of each institution support their decision

⁷ Tr. at 549.

⁸ Tr. at 215-18, 313-14.

to let the warden determine what publications are "detrimental to the security" of his facility. Nor were the defendants required to frame a standard that speaks in terms of a "likely," "immediate," or "substantial" threat.⁹ Such a restrictive standard could result in admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder. The Bureau's choice to avoid that risk is reasonable. It may be, of course, that the kinds of material wardens seek to exclude will enter prisons through other media, such as ordinary daily newspapers, radio and television. But it does not follow that there is no benefit in regulating a medium that is firmly within the warden's control.

2. *Procedure.* The process of excluding a publication begins when it is identified as questionable by a mailroom employee. The publication is forwarded to the warden or his staff, who decides whether or not the material should be admitted. If not, it is returned to the publisher and the inmate is "promptly advise[d] . . . in writing of the decision and the reasons for it," 28 C.F.R. § 540.70(d). As a recent amendment to the regulations provides, the notice must refer to the specific portion of the publication considered objectionable. *Id.* The inmate may appeal to the Regional Director and, at the national level, the General Counsel. *Id.*; 28 C.F.R. § 542.15. He may review the publication for purposes of the appeal, "unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order, or discipline of the institution." 28 C.F.R. § 540.70(d).

The plaintiffs' main procedural objection is that inmates are provided with inadequate statements of reasons for exclusion. They claim that reasons are expressed in such

⁹ Cf. Plaintiffs' Proposed Findings of Fact at 14.

broad terms as to be meaningless. The examples before the court, however, show that the notices normally make the general nature of the warden's objections clear: an issue of *Hustler*, for instance, was rejected because of "extreme pornographic content"; another issue was rejected because it was "deemed to incite abhorrent sexual behavior"; an issue of *The Militant* was rejected because it "is used in part to glorify problem inmates and prison unions" and "propagates [sic] an adversary attitude by inmates toward prison staff"; and an issue of *Crusader* was rejected because it "could elicit aggressive responses from other inmates who are not tolerant of the point of view of the Klu [sic] Klux Klan."¹⁰ Such explanations are not as articulate as they might be, but neither are they simply restatements of the general standard for excluding publications. Chiefly they lack reference to the circumstances in the prison that support the warden's decision. At first this is a striking omission, since the warden's awareness of conditions in his particular facility is the theoretical basis for his wide discretion to reject publications. Defense witnesses testified, however, that it is unwise to inform inmates of conditions that cause security concerns in the warden. Such a policy could expose weaknesses in prison security to exploitation by inmates. This reasoning, the court finds, supports the defendants' practice.

The failure to refer to institutional conditions makes the warden's written decision less easily reviewable. The warden and the Regional Director, however, are often in contact, and this usually provides the reviewing official with supplementary information. Of course, the warden is the source of the information and the process thus encourages heavy reliance on the warden's judgment. But deference to prison wardens on security matters is appropriate where, as here, the wardens make some effort to

¹⁰ Plaintiffs' Exhibits 75, 77, 91; Plaintiffs' Proposed Findings of Fact at 63.

articulate their judgments and thereby respect the interests of inmates. Another fault the plaintiffs find with the appeal process is the lack of an absolute right to review the excluded publication that is the subject of the appeal. But if a publication is excluded for security reasons, it might well be equally hazardous to permit temporary access to it. The warden should have the discretion to deny access to a publication for any purpose where providing it would be self-defeating.

The final contested Bureau practice regarding publications is the exclusion of whole publications when only portions are deemed offensive. The plaintiffs offered evidence that a less restrictive policy, at no cost to security, would be to tear out the rejected portions and admit the rest of the publication. But the defendants contend that such censorship would create more discontent than the current practice, and one of the plaintiffs' witnesses agreed.¹¹ It is not for this court to decide which practice would endanger security more; it is sufficient that the defendants' fears are reasonably founded.

C. Correspondence

1. *Prisoner-to-prisoner correspondence.* Generally inmates in federal institutions are not permitted to correspond with one another. Bureau regulations allow for prisoner-to-prisoner correspondence only where the wardens of both institutions approve. The grounds for approval may be that the inmates are members of the same immediate family, that they are involved in a legal action together, or that "other exceptional circumstances" exist. 28 C.F.R. § 540.16.

The plaintiffs contend that the general ban on prisoner-to-prisoner correspondence destroys prisoner relationships, thus working a hardship on inmates and prohibiting

¹¹ Tr. at 393.

a potentially rehabilitative activity. As on the publications issues, the plaintiffs point to state systems which have liberal policies but find no adverse results. They argue that inmate "grapevines" are usually strong enough to relay information between prisons without the benefit of mail privileges, rendering the ban on written communication useless and therefore unduly restrictive.

The defendants respond that prisoner-to-prisoner mail could be used for communication between members of prison gangs: in particular it could be used to arrange assaults on inmates who are transferred under the Bureau's protective custody program. Testimony on the conduct of prison gangs indicated that this is not a remote possibility. There was evidence, too, that prisoners have succeeded in sending letters to one another in order to carry on drug transactions and formulate escape plans. The plaintiffs suggest that the risk of such problems could be handled by monitoring correspondence; but the defendants reply that they could not hope to monitor a sufficient number of letters, and in any event, prisoners could easily write in private jargon that prison authorities would not understand. Thus no less restrictive policy than a general ban on inter-inmate correspondence is in the interest of security. The court sustains this position. Again, as in the case of publications, the Bureau is not obliged to take risks other prison systems accept, nor is it required to forego controlling one means of communication where it cannot control all means.

2. *Sealed outgoing general mail.* Mail from inmates in institutions at security levels 4-6 may not be sealed (with the exception of "special mail," *see infra*). The warden thus reserves the right to read any mail sent out by a prisoner. The plaintiffs argue that this policy chills free expression, and their experts testified that it does so unnecessarily. Prison wardens have more efficient ways of gaining information, according to their testimony, and

inmates have other ways of passing messages confidentially (e.g., by telephone). Nevertheless the court finds the policy reasonable. The Bureau permitted sealed outgoing mail for a short period but found that it was occasionally used to conduct illegal business (including drug traffic) and to make escape plans. Most alarming to the Bureau was a report, substantiated by an intercepted inmate letter, that gangs were planning to infiltrate the federal system because the confidential mail would facilitate their activities. In light of those results of the sealed mail policy, the Bureau was not wrong to reverse itself. A warden cannot read every outgoing prisoner letter, but the threat that one's mail will be read may well serve as a deterrent to illegal activity.

3. *Special mail.* Special mail includes mail sent to or received from the following:

President and Vice President of the U.S., attorneys, Members of the U.S. Congress, Embassies and Consulates, the U.S. Department of Justice (excluding the Bureau of Prisons but including U.S. Attorneys), other Federal law enforcement officers, State Attorneys General, Prosecuting Attorneys, Governors, U.S. Courts, State Courts. [28 C.F.R. § 540.2(c).]

It also includes mail sent to, but not received from, the following:

[the Bureau of Prisons], Surgeon General, U.S. Public Health Service, Secretary of the Army, Navy, or Air Force . . . U.S. Probation Officers . . . Directors of State Department of Corrections, State Parole Commissioners, State Legislators . . . and representatives of the news media. [*Id.*]

Outgoing special mail may be sealed and is not subject to inspection. 28 C.F.R. § 540.17(c). Incoming special mail may be opened "only in the presence of the inmate for inspection for physical contraband and the qualification of

any enclosures as special mail." 28 C.F.R. § 540.17(a). The sender must mark the envelope as "special mail" if it is to receive special treatment. 28 C.F.R. § 540.17(b).

The plaintiffs object to the fact that the list of outgoing special mail is larger than the list of incoming special mail. The reason for the discrepancy, according to the defendants, is that incoming material tends to jeopardize prison security more than outgoing material. A larger class of incoming special mail would increase the risk of contraband or potentially troublesome messages (e.g., escape plans) entering Bureau facilities. The court agrees that this is a legitimate security concern, and the reservation of the right to read mail from many government agencies is not an overreaction to the risk — especially since the contents of court and attorney mail, both incoming and outgoing, are kept fully confidential.

The plaintiffs urge that the class of outgoing special mail should be expanded to include mail to all government agencies. But this could allow inmates to send a great deal of sealed mail, which would lead to the same problems encountered when sealed mail was generally permitted. The restriction of sealed mail privileges to correspondence to courts, attorneys, law enforcement authorities, major public officers, several other agencies, and the press represents a fair accommodation of the plaintiffs' interests and the Bureau's security concerns.

4. *Enclosures in attorney-prisoner mail.* Mail from attorneys, like all incoming special mail, is inspected for contraband and to verify that it is indeed special mail. The plaintiffs object to this practice. The court, however, is mindful of the words of the Supreme Court:

The possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials' opening the letters . . . [Prison authorities], by acceding to a rule whereby the inmate

is present when mail from attorneys is inspected, have done all, and perhaps even more, than the Constitution requires. [*Wolff v. McDonnell*, 418 U.S. 539, 577 (1974).]

Contraband has been enclosed in mail from attorneys to federal inmates in the past, and attempts have been made to disguise letters as attorney mail in order to carry on illegal activities. The court therefore upholds the defendants' practice.

5. *Notification of opening of sealed mail.* Outgoing general mail from inmates in institutions at security levels 1-3 may be opened and read in the following circumstances:

(1) If there is reason to believe it would interfere with the orderly running of the institution, that it would be threatening to the recipient, or that it would facilitate criminal activity;

(2) If the inmate is on a restricted correspondence list; or

(3) If the correspondence is between inmates. [28 C.F.R. § 540.13(c).]

When mail is read and rejected, the inmate is notified in writing of the rejection and the reasons for it. 28 C.F.R. § 540.12. The inmate is not notified, however, when the mail is read and sent on. The plaintiffs argue that they should be notified in such instances; the defendants reply that this would increase the already sizable burden of screening inmate mail. Such an increase would presumably force the defendants to either divert manpower from other activities or read fewer letters (to compensate for the time spent on notification). Either alternative could weaken the security of an institution. While these considerations might not justify a policy of *never* informing inmates when their mail is opened, that is not the policy here: the Bureau policy, to some extent, accommodates the plain-

tiffs' interest in knowing when their correspondence has been disrupted. The Bureau is not required to strike the balance further in the plaintiffs' favor.

6. *Nude photos.* As a matter of unofficial policy, federal wardens do not admit nude photos of inmate family members or friends into federal prisons. A witness for the plaintiffs stated that such photos "can cause a lot of trouble . . . that neither the inmate nor the prison needs,"¹² and the court agrees. Comments on and theft of nude personal photos would be bound to provoke incidents; experience with photos smuggled into federal institutions tends to verify this. The court sustains the Bureau's policy.

7. *Rejection of mail and placement on restricted list.* Under a regulation in force at the time of trial, wardens were authorized to "reject correspondence sent by or to an inmate" if it contained "[c]lear harassment of a member of the public, including invasion of privacy." 28 C.F.R. § 540.13(e) (1982). This was also a criterion for placing an inmate on a restricted correspondence list, which permitted him to correspond with immediate family members and former business associates only. Since the trial, the "clear harassment" regulation has been changed; rejection of mail or placement on the restricted list are now authorized if a letter contains "[t]hreats, extortion, obscenity, or gratuitous profanity." 28 C.F.R. § 540.13(e)(4) (1983). The new regulation was promulgated to comply with *Samuels v. Smith*, No. TH79-124-C (S.D. Ind. Jan. 29, 1982), which held that the "clear harassment" language "violates the First Amendment unless it be construed as limited to threats, extortion, obscenity or gratuitous profanity." This court agrees that the current regulation permissibly authorizes wardens to protect the public from objectionable inmate mail.

¹² Tr. at 373.

A second basis for rejecting an inmate's incoming mail is that he receives an amount which "places an unreasonable burden on the institution." 28 C.F.R. § 540.13(a). The plaintiffs argue that the administrative burden of handling mail is not sufficient reason to reject incoming letters. The defendants counter that their personnel already expend a great deal of time handling mail; too much strain on their administrative resources, they suggest, could begin to weaken security, even when the strain is not placed directly on those responsible for maintaining order. The defendants' point may be valid in general; it has no application, however, to the rule at issue. When mail is rejected it is returned to the sender; the inmate is notified of the rejection, the reason for it, and his right to appeal. 28 C.F.R. § 540.12. Thus whether a letter is allowed in or rejected, a prison employee must deliver something to the inmate; the difference appears to be that in the case of a rejection, the institution must not only deliver an item but prepare it, address it, and send the rejected letter back. Even more of the institution's energy is required if the inmate exercises his right to appeal. In short, rejection of mail on ground of excessiveness merely replaces one procedure (delivery of the letter) with another, and a more cumbersome one at that. Moreover, institutions already have undisputed control over the number of "advertising brochures, flyers, and catalogues" an inmate may receive, 28 C.F.R. § 540.70(d). See 28 C.F.R. § 540.70(f). The authority to reject allegedly excessive personal correspondence as well implicates the rights of family members and others with a strong interest in communicating with an inmate, at no benefit to the institution. It follows that the rule granting this authority is not "necessary or essential" to further the defendants' objectives, see section II *infra*, and cannot stand.

Placement on a restricted list may be based on the "threats, extortion, [etc.]" criterion discussed above. It

may also be predicated on other factors, including an inmate's:

(2) Attempting regularly to correspond with persons or businesses where the addressee is known by the inmate only through such sources as advertisements in newspapers, magazines, telephone directories, etc.;

. . . .

(6) Having participated in major criminal activity of a sophisticated nature; or

(7) Notoriety or being highly publicized. [28 C.F.R. § 540.14(a).]

The plaintiffs contest these criteria as unnecessary and overbroad. The court agrees. The prohibition against "regular" correspondence with the "persons or businesses" described is allegedly necessary because in the past, inmates have written to strangers in order to carry out extortion or solicit funds for unauthorized ventures. But such activities are already grounds for placement on a restricted list under other rules. No purpose is served by additionally prohibiting a form in which extortion and solicitation are sometimes carried out; especially, in this case, considering the steps necessary to enforce the rule. A prison employee would first have to note that an inmate was writing "regularly" to "persons or businesses."¹³ An employee would then have to ascertain whether the addressee was a stranger to the inmate, presumably by either asking the inmate, asking the addressee, or (more likely, at least as an initial measure) reading one of the letters. In order to enforce the rule, in other words, the institution must keep track of and read an inmate's mail, and perhaps investigate further. The rule thus makes no advance whatever on the institution's ability to prevent or halt

¹³ The rule does not make clear whether this means writing many letters to the same person or business, or writing letters to various persons or businesses.

illegal activity, since it has the right to monitor the inmate's mail in any event.¹⁴ It merely authorizes restriction of an inmate's mail for writing letters that may or may not be illegal. The net result is a regulation that may be applied against inmates who have not abused their rights, with no correlative gain on the part of the institution.

Likewise, an inmate's involvement in "major criminal activity of a sophisticated nature" cannot serve as a ground for limiting an inmate's mail. The defendants argue that this criterion is necessary because inmates who have participated in major, sophisticated crimes are likely to continue their activities by mail if permitted. But the regulations already authorize restricting the correspondence of an inmate who "committed an offense involving the mail," 28 C.F.R. § 540.14(a)(5). Inmates who were involved in sophisticated crime other than mail fraud might also attempt abuse of mailing rights, but those are precisely the inmates whose mail the institutions would normally monitor. Obviously the staff cannot read all outgoing general mail; the correspondence of a class of inmates who are considered likely to commit mail offenses, however, would seem to have priority. Monitoring that mail should not be an onerous burden on the institution if inmates who have committed mail fraud may be dealt with more peremptorily. Moreover, even if attempts at criminal activity would be successfully mailed out despite spot-checks by the prison staff, it is not clear that an internal security problem would result. If contraband were mailed to the inmate, it would have to pass by prison employees first. See 28 C.F.R. § 540.13(f) ("Institution staff shall open and inspect all incoming general correspondence").

¹⁴ Level 1-3 institutions do not have the right to read outgoing mail. But they may read incoming mail, and they may take note of who an inmate writes to. In any event, the inmates in those institutions are there because they are not sufficiently high risks to be placed in level 4-6 institutions.

If a member of the public received something objectionable, a complaint on his part would remedy the problem; an institution does not need the broad preventive power here that it requires where a riot or assault is possible. In short, no security interest is served by permitting wardens to restrict an inmate's mail solely because he was involved in "sophisticated" crime; and the defendants already have adequate means to combat illegal activity.

Similarly, the rule that permits wardens to limit the mail of "highly publicized" inmates is not necessary. The defendants contend that such inmates tend to attract followers who are easily exploited and induced to commit crimes. But again, reading the mail of those inmates and inspecting it for contraband are measures already within the defendants' power. The interests of non-inmates are protected by the defendants' ability to retaliate when an inmate actually abuses the mail; no broad authority is necessary from the institution's point of view.

II. Conclusions of Law

The plaintiffs' claims arise primarily under the first amendment. The Supreme Court has recently reaffirmed that first amendment guaranties apply to prison inmates. See *Hudson v. Palmer*, 104 S. Ct. 3194, 3198 (1984). The analysis to be used, however, requires some discussion.

The plaintiffs argue that the proper standard for evaluating first amendment claims of prisoners is stated in *Procunier v. Martinez*, 416 U.S. 396 (1974). The regulations in *Martinez* authorized employees of California correctional facilities to reject outgoing prisoner mail if, *inter alia*, it "express[ed] inflammatory political, racial, religious or other views or beliefs." *Id.* at 399. In declaring the regulations unconstitutional, the Court enunciated a strict standard of review:

First, the regulation or practice in question must further an important or substantial governmental in-

terest unrelated to the suppression of expression . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad. [*Id.* at 413-14.]

The plaintiffs construe this language to require prison officials to use the least restrictive means in regulating areas that implicate the first amendment. In context, however, the broad language is limited. The Court stressed that the regulations at issue applied to correspondence with non-inmates: this took the case out of the " 'prisoners' rights' " category and raised "the general problem of incidental restrictions on First Amendment liberties imposed in furtherance of legitimate governmental activities." *Id.* at 408, 409. The Court made the rights of noninmates central to its analysis. *Id.* at 407-09.

When the court squarely addressed the first amendment rights of prisoners later that term in *Pell v. Procunier*, 417 U.S. 817 (1974), its approach was less definitely articulated. The plaintiffs contested regulations prohibiting face-to-face meetings between press representatives and any inmates whom they would specifically name and request to interview. The language of the Court's opinion emphasizes the limited nature of a prisoner's first amendment rights:

We start with the familiar proposition that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." . . . In the First Amendment context a corollary of this principle is that a prison inmate retains those First Amendment rights that are not inconsistent with his status as a

prisoner or with the legitimate penological objectives of the corrections system. [*Id.* at 822, quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948).]

The "legitimate penological objectives" referred to — deterrence, rehabilitation, and most important, internal security — are given as the touchstones of first amendment analysis in the prison context. *See id.* at 822-23. The measures necessary to achieve those objectives, the Court says,

are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. [*Id.* at 827.]

Thus on the face of it *Pell* is a strong statement in favor of deference to prison administrators' security judgments. The opinion, however, also warns that "[c]ourts cannot . . . abdicate their constitutional responsibility to delineate and protect fundamental liberties." *Id.* Moreover, the holding ultimately rests on a relatively narrow ground: the Court found the restriction on interviews minimal in light of the many avenues of communication open to inmates, including ways to communicate with the press. *Id.* at 823-28. The analysis thus evokes the *Martinez* principle that limitations on first amendment freedoms must be "no greater than necessary or essential," 416 U.S. at 413.

The side of *Pell* which stresses deference to prison administrators has dominated subsequent opinions. It was applied in *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977), which upheld prohibitions on prisoner union meetings and recruitment. The Court quoted the sections of *Pell* excerpted above, adding that prison officials must be permitted the discretion to prevent violence

at early stages. *Id.* at 132-33.¹⁵ It did not limit its analysis to freedom of association cases: freedom of association, the Court said, was merely "the most obvious of the First Amendment rights that are necessarily curtailed by confinement." *Id.* at 125. The regulations were upheld because they were "rationally related" to prison security. *Id.* at 129. To similar effect is *Bell v. Wolfish*, 441 U.S. 520 (1979), which reiterates the proposition that absent "substantial evidence" of an "exaggerated" response to security concerns, the judgments of prison administrators should be upheld. *Id.* at 548. The opinion instructs courts to give "wide-ranging deference" to wardens in security matters. *Id.* at 547.

Thus the first amendment claims of the prisoners in this action are governed by two sets of authorities: *Martinez* on the one hand, and the *Pell* line of cases on the other. *Martinez* applies to the regulations on subjects where the rights of prisoners and non-prisoners are "inextricably meshed," 416 U.S. at 409; that is, the correspondence regulations except for the rule on prisoner-to-prisoner correspondence.¹⁶ Those regulations must be "necessary or essential" to further security interests. *Id.* at 413. The court has found as a matter of fact that the regulations meet that standard, except for certain rules concerning rejection of mail and placement on restricted lists.

The *Pell* line of cases applies to the remaining rules. Those cases require the Bureau to articulate a relationship between its regulations (and practices) and legitimate pen-

¹⁵ "Responsible prison officials must be permitted to take reasonable steps to forestall such a threat, and they must be permitted to act before the time when they can compile a dossier on the eve of a riot."

¹⁶ The publications regulations are not governed by *Martinez* because the rights of publishers are not "inextricably meshed" with those of inmates. See *Pell v. Procunier*, 417 U.S. 817 (1974) (rights of inmates and reporters treated separately).

ological objectives such as internal security. Once the Bureau meets that requirement, the plaintiffs must show by "substantial evidence" that the defendants have "exaggerated their response" to the problems the regulations address. See *Bradbury v. Wainwright*, 718 F.2d 1538, 1541-43 (11th Cir. 1983); *Otey v. Best*, 680 F.2d 1231, 1233 (8th Cir. 1982); *St. Claire v. Cuyler*, 634 F.2d 109, 114 (3rd Cir. 1980). In its findings of fact the court has applied this legal framework to the policies and practices not governed by *Martinez* and concluded that they must be upheld.

The fact the publishers join in challenging these regulations does not change this result. Cases have long rejected the assertion that "people who want to propagandize . . . views have a constitutional right to do so whenever and however and wherever they please." *Adderly [sic] v. Florida*, 385 U.S. 39, 48 (1966) (upholding convictions of demonstrators for trespassing on jail grounds). It is a "reasonable time, place, and manner restriction" on expression, *Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065, 3069 (1984), to limit the mailing of prisoner union and similar potentially volatile publications into a penitentiary—especially where there is no blanket ban on the publications but case-by-case determination of their admissibility.

The *Pell* approach also applies to the plaintiffs' due process claims. See *Wolfish*, 441 U.S. at 544-48; *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). The court has evaluated the procedures for rejection of publications under this analysis and found them satisfactory. The same result obtains in the correspondence area: given the provisions for notice of adverse action and the right to appeal, there are sufficient procedures surrounding the exercise of the warden's authority. Finally, the sole sixth amendment claim concerns inspection of attorney mail. The court finds no distinction between this claim and the one rejected

in *McDonnell*, except that the defendants in this case produced evidence that mail from attorneys has actually led to breaches of security. The sixth amendment claim therefore must be rejected.

III. Conclusion

The plaintiffs have not shown that the defendants' current policies and practices regarding incoming publications violate the Constitution. They have shown, however, that certain regulations concerning inmate correspondence violate the first amendment. An appropriate order will issue.

/s/ WILLIAM B. BRYANT
William B. Bryant
United States District Judge

Date: September 13, 1984

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

C.A. No. 73-1047

JACK ABBOTT, ET AL., PLAINTIFFS

v.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

[Filed Sep. 13, 1984]

ORDER

In accordance with the accompanying Memorandum Opinion it is hereby

ORDERED that the defendants and their agents and successors are permanently enjoined from enforcing or applying the regulations now published at 28 C.F.R. §§ 540.13(a), 540.14(a)(2), 540.14(a)(6), and 540.14(a)(7); and further

ORDERED that in all other respects judgment is entered for the defendants.

/s/ WILLIAM B. BRYANT
William B. Bryant
United States District Judge

Date: September 13, 1984

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 84-5718

Civil Action No. 73-01047

JACK ABBOTT, ET AL., APPELLANTS

v.

EDWIN MEESE, III,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA**

[Filed July 28, 1987]

JUDGMENT

Before: EDWARDS and RUTH B. GINSBURG, Circuit Judges, and FAIRCHILD, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit.*

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed in part, reversed in part, and this case is

* Sitting by designation pursuant to 28 U.S.C. § 294(a).

remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court:

/s/ GEORGE A. FISHER

George A Fisher, Clerk

Date: July 28, 1987

Opinion for the Court filed by Senior Circuit Judge FAIRCHILD.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5718

JACK ABBOTT, ET AL.

v.

ELLIOT L. RICHARDSON, INDIVIDUALLY AND AS ATTORNEY
GENERAL OF THE UNITED STATES, ET AL.

[Filed Oct. 13, 1987]

ORDER

Before: EDWARDS and RUTH B. GINSBURG, Circuit
Judges, and FAIRCHILD*, Senior Circuit Judge,
U.S. Court of Appeals for the Seventh Circuit.

Upon consideration of appellees' petition for rehearing,
filed September 11, 1987, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

For The Court:
George A. Fisher, Clerk

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

* Sitting pursuant to 28 U.S.C. § 294(d).

(2)
No. 87-1344

Supreme Court, U.S.

FILED

APR 1 1988

U.S. SUPREME COURT

IN THE
Supreme Court of the United States
October Term, 1987

EDWIN MEESE III, Attorney General
of the United States, *et al.*,
Petitioners,

v.

JACK ABBOTT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

**BRIEF OF RESPONDENTS IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that the constitutionality of prison regulations and policies governing the receipt of publications by federal prisoners should be evaluated under the First Amendment standard established in Procunier v. Martinez, 416 U.S. 396 (1974), so that the district court should on remand determine (1) whether important and substantial governmental interests in security, order and rehabilitation are furthered by the federal prison regulations and practices at issue; and (2) whether the limitations of First Amendment freedoms are no greater than necessary or essential to protect the particular governmental interest involved?

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The Respondents, Jack Abbott, et. al., respectfully request that this Court deny the petition for the writ of certiorari, seeking review of the District of Columbia Circuit's opinion in this case. That opinion is reported at 824 F.2d 1166.

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1987. Petitioners' Appendix (hereinafter P.A.) at 50a-51a. A Petition for Rehearing was denied on October 13, 1987. P.A. at 52a. A Petition for the Writ of Certiorari was filed on February 10, 1988. On February 29, 1988, the Clerk of the Supreme Court, pursuant to Rule 29.3, extended the time within which to file a Brief in Opposition to the Petition to April 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This case was filed in 1973 on behalf of a class of all federal prisoners challenging the Federal Bureau of Prisons' ("Bureau") policies and practices with respect to receipt of publications and correspondence. Brought under 28 U.S. §1331, it sought declaratory and injunctive relief for the deprivation of rights under the First, Fifth and Sixth Amendments to the United States Constitution. Class certification on the injunctive claims was granted on June 7, 1974. In 1978 three publishers intervened as plaintiffs: Weekly Guardian Associates, publisher of The Guardian magazine; Prisoners' Union, publisher of The Outlaw magazine; and Revolutionary Socialist League, publisher of The Torch magazine.¹

¹ In addition, eighty-two named plaintiffs also sought damages for discrete incidents involving violation of these rights occurring at Bureau facilities. In 1973, the damage claims were severed from

At the 1981 trial on the equitable claims, the plaintiffs introduced into evidence forty-six books and publications that were rejected from various federal prisons. Plaintiffs introduced the testimony of six experienced corrections experts, an expert in correctional psychiatry and Dr. Marvin Wolfgang, a nationally known penologist. The evidence demonstrated, often from prison officials' own admissions that these specific items did not pose any threat to prison security. See n.6 below for examples from that evidence. The Bureau's case consisted of documentary material and the testimony of prison officials and of one outside corrections expert.

The district court's memorandum opinion was filed on September 13, 1984.

the requests for declaratory and injunctive relief. These claims are still pending.

P.A. at 26a-49a. The district court rejected a facial attack on the publication regulations and upheld them as necessary to prevent prisoners from reading "potentially disruptive" materials. P.A. at 31a. The rejection of the forty-six specific publications was upheld en masse, without findings that any of the rejected materials posed a threat to security if read by federal prisoners. P.A. at 30a-31a.² The court accepted the proposition

² In fact, the record below is devoid of evidence of actual security threats created by publications read by prison inmates. The Petition attempts to remedy this omission by its reference to the recent disturbances among Cuban prisoners in two federal prisons. Pet. at 18. This contention is, of course, unsupported by the record. Indeed, the Court can take judicial notice of the fact that the Bureau blamed public news broadcasts, for triggering the disturbances. The Bureau regulations at issue here have no application to the possible censorship of such broadcasts. Accordingly, the Bureau regulations at issue are irrelevant to the Mariel Cuban prison disturbances and the holding of the Court below can not increase the risk of such incidents.

that prison wardens are entitled to "wide discretion" in content-based censorship pursuant to a "generalized" regulation and, in effect, that their decisions are subject to little or no judicial review. P.A. at 31a-32a. The court next upheld the Bureau's practice of excluding an entire publication when only portions are deemed offensive on the grounds that the alternative practice of deleting the objectionable material suggested by plaintiffs would cause prisoner discontent. P.A. at 34a. The district court asserted that its conclusions were grounded in the test established in the line of cases beginning with Pell v. Procunier, 417 U.S. 817 (1974), P.A. at 46a-47a, but did not explain how it applied the Pell test to reach its conclusions.³

³ The district court made other rulings that were not the subject of the appeal in the Court of Appeals, Pet. at 2, n.1, nor are they raised in this Court by Petitioners.

Respondents raised three separate publications issues on appeal to the District of Columbia Circuit: (1) a facial challenge to the Bureau's criteria for the censorship of publications; (2) an "as applied" challenge to the Bureau's censorship of the forty-six individual publications; and (3) a challenge to the Bureau's practice of censoring an entire publication on the basis of a single objectionable page or article.

The Court of Appeals held that the Procunier v. Martinez, 416 U.S. 396 (1974), test was the appropriate standard for determining the constitutionality of the issues that the appeal raised.⁴ The Court below reached this conclusion because both Martinez and this case implicated the interests of nonprisoners in communication

⁴ For the reasons stated at 18-21, infra, Respondents disagree with the claim in the Petition's Statement of Facts that the Martinez standard is a strict scrutiny standard.

by written means with individual prisoners and because both cases involved censorship on the basis of viewpoint. P.A. at 7a-8a and 14a. The Court of Appeals reviewed Turner v. Safley, ___U.S.___, 107 S.Ct. 2254 (decided on June 1, 1987) and determined that neither Turner, P.A. at 8a, n.1, nor any prior Supreme Court cases including Pell v. Procunier; Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977); and Bell v. Wolfish, 441 U.S. 520 (1979) were applicable. P.A. at 10a-13a.

Applying Martinez to the facial validity of the regulations, the Court of Appeals concluded that Martinez required "a causal nexus between expression and proscribed (sic) conduct" and therefore held that if publications were found to "encourage" violence or other breaches of security the regulation "could survive the minimum Martinez tests." P.A. at 14a. In

contrast, the Court determined that regulations banning material that was deemed "detrimental to security, good order, or discipline," that "might facilitate criminal activity," or that merely "depicts," "describes" or "instructs in" prohibited activities, "permit[ted] a far looser causal nexus" than Martinez would allow. P.A. at 15a-16a. The Court of Appeals also held that the Bureau practice of rejecting an entire publication, when only a portion was deemed objectionable, failed to meet the second prong of the Martinez test. P.A. at 17a.

The Court below also held that the district court improperly failed to address the merits of the censorship of the forty-six publications. "[T]he rejections should have been addressed individually and none upheld unless consistent with Martinez." P.A. at 20a-21a. The Court also noted that the publication rejections occurred as

early as 1977, and that at the time of trial in 1983 there was evidence that the Bureau had changed its opinion with respect to the reading by prisoners of some of this material;⁵ it suggested that in the first instance the district court should determine "whether and to what extent individual rejections are moot." P.A. at 21a.

REASONS FOR DENYING THE PETITION FOR THE WRIT OF CERTIORARI

I. BECAUSE THE JUDGMENT REQUIRES FURTHER PROCEEDINGS ON REMAND, A GRANT OF CERTIORARI IS INAPPROPRIATE

The Court of Appeals' decision required the district court on remand to apply the Martinez test to each of the rejected publications. Further, the district court was directed to determine which publications the Bureau would permit

⁵ There was also substantial evidence that there had never been any justification for the censorship of some items. See n.6, below.

its prisoners to receive.⁶ As to those the

⁶ The Court of Appeals noted that defendants' witnesses testified at trial in 1983 that some publications would not then be rejected. P.A. at 21a. Indeed, the record demonstrates (much of it based on defendants' own testimony) that some publications did not pose a threat to prison security even at the time of the initial rejection. For example:

(1) Win Magazine, a leftist political periodical (May 5, 1981 issue) (P-Exh. 101, A-214-243), was rejected at Leavenworth on the ground that the content of one article "depicts, describes or encourages activities which may lead to [the] use of physical violence or group disruption." P-Exh. 99, A-207; Henderson T.1150Q, A-369. The Regional Director admitted that although the article criticized the prison industries program at Leavenworth, the criticism in itself was not enough to exclude it, and therefore, the publication would be allowed into every federal prison in the region, which includes the federal penitentiaries of Marion, Terre Haute, and Leavenworth. T.1150.

(2) The Call, a leftist political newspaper (issue of March 21, 1977) (P-Exh. 15, A-132-139), was rejected from Marion because "it has a tendency to glorify problem inmates, homosexuals and prison unions which have caused problems to inmates and staff." Adm. 575, 582; P-Exh. 15, A-131. The prison officials conceded that this issue was not a threat to

prison security. Wilkinson Dep. 20-21; Williams Dep. 133-134, A-311-312. The Regional Director acknowledged that he did not have any problem with the references to strikes, fasts, prisoner resistance, or struggle against oppression. Henderson Dep. 80, A-288. The Director of the Bureau, Norman Carlson, stated that he would not support exclusion of The Call from Marion today. Carlson Dep. 96, A-277.

(3) The Guardian, a leftist political newspaper (issue of March 30, 1977) (P-Exh. 47, A-180-181), was rejected from Marion because the publication "promoted the formation of prisoner unions and an adversary attitude toward staff." Adm. 695, 696). The officials who rejected the publication acknowledged that this issue, in fact, was not detrimental to security. Williams Dep. 106-108, A-307-309; Cripe Dep. (II) 87, A-281.

(4) The Labyrinth, a leftist prisoner-oriented periodical (issue of April 1977) (P-Exh. 18, A-148-155), was rejected from the Atlanta Penitentiary because it was "inflammatory," Adm. 772, and from Marion because the article criticizing prison medical care entitled "Medical Murder" was "slanted." Williams Dep. 121, A-310. The Warden at the Marion Penitentiary conceded that the publication was improperly rejected. Wilkinson Dep. 34-35, A-318-319. The Regional Director testified that the issue was

Bureau would permit there is no continuing controversy between the parties; clearly,

acceptable. Henderson Dep. 76.

(5) Join Hands, a leftist political newspaper (Oct./Nov., 1976) (P-Exh. 22, A-156-163), was rejected from the Atlanta Penitentiary because it was "inflammatory," Todd Dep. 30-31; "advocates homosexuality," Adm. 760, 765, A-261, 263, or "advocates a prohibited act," McCune Dep. 59; T.1063, A-368. Lewisburg Penitentiary officials reviewed the magazine and said it was acceptable. Naves Dep. 129-130, A-293-294. Director Carlson testified that most Bureau institutions would allow inmates to read this issue and "it surely is not as much of a threat as some of the homosexual publications." Carlson Dep. 91, A-278.

(6) Worker's World, a weekly newspaper of the Worker's World Party (April 15, 1977) (P-Exh. 105, A-244-246), was rejected from the Marion Penitentiary on the ground that it "supports the gay rights of inmates and rebellion and boycotting by inmates as a legitimate means of achieving goals." Adm. 934; Cripe Dep. (II) 97-98. The General Counsel who had affirmed rejection of this newspaper admitted that there was nothing in it that supported the reasons given for its rejection and there was no portion of it that he could identify as objectionable. Cripe Dep. (II) 95-96.

some portion of the case is moot. Moreover, a remand is necessary in order to have the district court apply the appropriate test to the remaining legal issues. After the district court has applied the appropriate standards to the publications on remand it will be far easier to assess the extent to which there is any continuing controversy between the parties. It will also be far easier to assess the concrete impact of applying Martinez standards to current censorship of publications under Bureau regulations.

As a result of the remand order, this case is simply not ripe for review by means of certiorari. In Brotherhood of Locomotive Firemen v. Bangor and Aroostook R.R., 389 U.S. 327 (1967) this Court held certiorari inappropriate on ripeness grounds. The case involved a labor dispute in which a union was held in contempt for violating the injunction. On appeal the

case was remanded "to consider whether there had in fact been a contempt, and, also, if there was a contempt, whether it was 'of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey.'" Id. at 328. See also Hamilton-Brown Shoe Co. v. Wolf Brothers and Co., 240 U.S. 251, 257-258 (1916).

This is not merely a theoretical point. In evaluating the propriety of a restriction on speech, the actual sweep of the restriction and its effect on expressive activity may be essential to the analysis. See, e.g., Gooding v. Wilson, 405 U.S. 518 (1972) (determining whether Georgia breach of the peace statute was overbroad by reference to reported state cases applying statute to specific spoken words). Here, where so much of Respondents' case rests on the application

of regulations, this Court's review of the issues will be unnecessarily abstract until the district court has applied the ruling of the Court of Appeals.

II. THE DECISION OF THE COURT BELOW IS NOT IN DIRECT CONFLICT WITH A DECISION OF ANY OTHER COURT OF APPEALS

One of the prime purposes of certiorari jurisdiction is to bring about uniformity of decisions among the federal courts of appeals. Hence, the existence of an irreconcilable conflict among the circuits on a matter of federal law is ordinarily enough to secure review. See, e.g., Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 559 (1968); Northeastern National Bank v. United States, 387 U.S. 213, 217 (1967).

In this case, the existence of a conflict of this nature is conspicuously absent. The Petition effectively concedes as much by its failure to cite a single

case from a court of appeals that is inconsistent with the holding of the Court below. In fact, the courts of appeals that have confronted the issue to date have been remarkably uniform in their recognition that Procunier v. Martinez establishes the controlling standard for censorship of publications in the prison context. No fewer than nine circuit courts have applied the standard set forth in Martinez to cases reviewing restrictions on inmates' freedom to read books and magazines. See 16-18 infra. Indeed, among them are two post-Turner decisions that have followed the lead of the District of Columbia Circuit in confirming the continuing precedential validity of the Martinez case in this context. Lawson v. Dugger, ___ F.2d ___ No. 86-5774 (11th Cir. December 21, 1987) reh. den. ___ F.2d ___ (March 3, 1988) (Slip Opinions lodged with Court);

Valiant-Bey v. Morris, 829 F.2d 1441 (8th Cir. 1987).

The issue in Lawson was whether state prisoners in Florida could receive literature published by a religious organization called the Hebrew Israel Faith, and directed at Black Americans. The prison officials sought to justify its banning the literature by claiming that it was racist and engendered violence among inmates.

Distinguishing Turner on the ground that the case before it "concerns more than 'prisoners' rights'; it also concerns the First Amendment rights of the [religious organization]," the court held that Martinez supplied the applicable standard of review for content-based restrictions. Id. at 2085. (See March 3, 1988 Slip Opinion.)

In Valiant-Bey v. Morris, 829 F.2d at 1443, the Eighth Circuit reversed a

judgment on the pleadings in favor of the defendant prison officials on plaintiffs' claim arising from the confiscation of his religious materials, and remanded the case to the district court to evaluate the defendants' decision under the standards announced in Martinez. Id. at 1443-1444.

Pre-Turner decisions also require compliance with the Martinez standard for content-based restrictions on prisoners' right to read. See Murphy v. Missouri Department of Corrections, 814 F.2d 1252, 1256 (8th Cir. 1987); Brooks v. Seiter, 779 F.2d 1177, 1180-81 (6th Cir. 1985); Dooley v. Quick, 598 F.Supp. 607, 620-622 (D.R.I. 1984), aff'd 787 F.2d 579 (1st Cir. 1986); Pepperling v. Crist, 678 F.2d 787, 790 (9th Cir. 1982); Guajardo v. Estelle, 580 F.2d 748, 760-762 (5th Cir. 1978); Hopkins v. Collins, 548 F.2d 503, 504-505 (4th Cir. 1977); Aikens v. Jenkins, 534 F.2d 751, 755 (7th Cir. 1976); and Morgan v. LaVallee,

526 F.2d 221, 224-225 (2d Cir. 1975).

If a lack of uniformity on a question of law among the circuits is a factor in the exercise of certiorari jurisdiction, then certainly the converse is true where, as here, the Court is confronted with unanimity among the courts of appeals. Under these circumstances, prudential considerations counsel against the grant of certiorari and the Petition should be denied.

III. THE COURT BELOW CORRECTLY APPLIED MARTINEZ

A. The Martinez Standard Is Not a Strict Scrutiny Standard

Throughout the Statement of Facts and argument, Petitioner states that the Court of Appeals applied a "strict scrutiny" standard. See, e.g., Pet. at 1, 2, 8, 9, 10. "Strict scrutiny," a term derived in the first instance from equal

protection analysis,⁷ is sometimes used in First Amendment cases to denote the most stringent standard of review, a standard that requires that governmental restrictions be justified by a showing of a "compelling interest" or a "clear and present danger." See, e.g., Arkansas Writers' Project, Inc. v. Ragland, ___ U.S. ___, 107 S.Ct. 1722, 1731-1732 (1987) (Scalia, J., dissenting); Munro v. Socialist Workers Party, ___ U.S. ___, 107 S.Ct. 533, 542-543 (1986) (Marshall, J., dissenting); Levine v. United States District Court for the Central District of California, 764 F.2d 590, 595 (9th Cir. 1985), cert. den., ___ U.S. ___, 106 S.Ct. 2276 (1986).

The Procunier v. Martinez standard relied on by the Court of Appeals

⁷ See, e.g., San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973) (holding statutory exclusion of aliens not subject to strict scrutiny for equal protection purposes).

is not a strict scrutiny standard. The Martinez Court began by noting that the lower courts had proposed a variety of standards for reviewing prison regulations restricting freedom of speech, ranging from a complete "hands-off" deference approach to a "compelling state interest" or "clear and present danger" test. 416 U.S. at 407-408. The Court also noted the "intermediate position" that a "regulation or practice which restricts the right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably and necessarily to the advancement of some justifiable purpose." Martinez at 408, quoting Carrothers v. Follette, 314 F.Supp. 1014, 1024 (S.D.N.Y. 1970). The standard adopted in Martinez requires that the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of

expression and the restriction must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Id. at 413-414.⁸ Significantly, this standard is essentially equivalent to the Carrothers intermediate standard. This is a balanced approach that recognizes both the rights that free citizens must retain to communicate with prisoners and the legitimate security concerns of prison administrators.

B. Turner Does Not Disturb the Applicability of the Martinez Standard

In Turner v. Safley, this Court last term considered a challenge to the inmate-to-inmate correspondence and

⁸ The Martinez test is derived in large measure from United States v. O'Brien, 391 U.S. 367 (1968), which rejected a challenge to a federal statute prohibiting the burning of draft cards. The O'Brien standard was formulated to test incidental restrictions on free speech occasioned by the legitimate exercise of governmental power.

marriage regulations of the Missouri prison system. Nothing in Turner suggested that the authority of Martinez had been eroded. Rather, the Court declined to apply Martinez to the inmate-to-inmate correspondence issue because the regulation, unlike the regulations challenged in the instant case, did not cause "a consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners." Martinez at 409 quoted in Turner at 2260 (emphasis added in Turner).⁹

⁹ The Court also found that it did not have to resolve whether the Martinez test applied to the marriage regulation because the regulation failed to meet even the reasonable relationship test. Turner at 2266.

Arguably, Martinez would not apply because a marriage ceremony, presumably involving some form of direct contact, raises security concerns similar to visits, so that the standards of Pell v. Procunier and Block v. Rutherford, 468 U.S. 576 (1984) apply. This case, unlike the marriage regulations deals solely with the regulation of pure First Amendment expression, unaccompanied by any conduct,

C. The Publisher Plaintiffs Have A "Particularized Interest" under Martinez in Communicating with Prisoners

In Martinez, the Court noted that persons corresponding with a prisoner had a particularized interest in that communication. 416 U.S. at 408. The Petition argues that the publisher plaintiffs here lack a comparable particularized interest in their prisoner audience. However, the publishers produce books, magazines, and newspapers for public consumption both inside and outside prison. These publications are mailed to particular named individual prisoners who have expressed an interest in reading them and in some cases have subscribed and paid for them.¹⁰ Surely in the context of the

on the basis of the content of the expression.

¹⁰ Some publishers, like those who publish the Outlaw, offer their political publications free of charge to subscribers. However, all the publications involve individual mailings to prisoners who have

rights of the press, this is as "particularized" an "interest" as anyone could demand.

It is ironic that the Petition seeks a lower level of constitutional protection for newspapers and other publications than for personal correspondence. The history of the First Amendment makes it clear that the Founders' primary concern was to abolish restrictions on public discourse on matters of political and governmental concern--exactly the nature of the publications censored by the Bureau in this case. See generally Z. Chafee, Free Speech in the United States, 18-20 (1941).

D. The Court of Appeals' Application of Martinez Is Consistent with This Court's Public Forum Cases

The Petition argues that under

requested receipt of the publication. Mass mailing cases might raise issues of prison security beyond those implicated in this case.

this Court's public forum cases, a standard lower than the Martinez standard applies. Pet. at 16-17. However, the Bureau censorship at issue is not viewpoint-neutral, so that the regulations and practices involved here do not meet the criteria the Court has established for regulation of expression even in non-public forums.

This Court has traditionally distinguished First Amendment challenges arising in public forums from First Amendment challenges that do not involve a public forum. In cases that do not involve a public forum, the Court has allowed content-related regulation in the sense that the Court has allowed the government to exclude all expression on certain topics. In such cases, however, the Court has been careful to require that governmental regulation be viewpoint-neutral in the sense that if any

communications are allowed on a particular topic, the restrictions cannot exclude particular communications on that topic on the basis of the viewpoint expressed. See, e.g., Perry Educational Ass'n. v. Perry Local Educators Ass'n., 460 U.S. 37, 46 (1983).

As the Petitioners conceded below¹¹ and as the Court of Appeals found,¹² the Bureau's regulations are not viewpoint-neutral. Examination of the censored publications shows that the regulations have been used to exclude unorthodox or unpopular viewpoints, particularly those that are most critical of the status quo of persons and institutions in power, including prison officials. For example, among the forty-six excluded publications was an article

¹¹ Appellee's Brief in the Court of Appeals at 33.

¹² P.A. at 7a, 14a.

from a publication critical of health care provided to federal prisoners reporting on the facts that gave rise to Carlson v. Green, 446 U.S. 14 (1980).¹³

Because the regulations are not viewpoint-neutral, the predicates for applying non-public forum doctrine are not present. Cf. Pell v. Procunier, 417 U.S. at 828.

So long as this restriction [on prison visitation] operates in a neutral fashion, without regard to the content of the expression, it falls within the "appropriate rules and regulations" to which "prisoners necessarily are subject" and does not abridge any First Amendment freedoms retained by prison inmates.

(Citation and footnote omitted)

Accordingly, the regulations at issue in this case do not satisfy the criteria for validity established in this Court's non-public forum cases.

¹³ See n.6, example 4 (exclusion of The Labyrinth) (April, 1977).

IV. THE MARTINEZ TEST, HELD APPLICABLE BY THE COURT OF APPEALS, IS A BALANCED TEST THAT REQUIRES THE DISTRICT COURT ON REMAND TO CONSIDER THE BUREAU'S LEGITIMATE INTERESTS IN SECURITY, DISCIPLINE AND REHABILITATION

The Petition seriously misconstrues the test established in Martinez and as a result predicts dire consequences for prison security, order and the prevention of prison violence. As noted below, however, Martinez requires the consideration of "the substantial governmental interests [in] security, order and rehabilitation" in its first prong. Id. at 414. Justice Powell in Martinez, in the context of discussing these legitimate concerns, noted that

[t]he case at hand arises in the context of prisons. One of the primary functions of government is the presentation of societal order through enforcement of the criminal law; and the maintenance of penal institutions is an essential part of that task. The identifiable governmental interests at stake in this task are the preservation of internal order and discipline,

the maintenance of institutional security against escapes or unauthorized entry...

Id. at 413.

Censorship, said the Court, would be justified in an effort to prevent escapes, proposed criminal activity, or the transmission of encoded messages. Id. at 414.¹⁴ The Martinez standard accordingly incorporates an appropriate level of deference to prison security and other appropriate governmental interests.

The lower federal courts have had extensive experience in the application of the Martinez test over the previous fourteen years. There is simply no evidence that the application of Martinez has resulted in the entry of dangerous

¹⁴ Respondents have not challenged Bureau regulations prohibiting material that "depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;" "depicts or describes procedures to brewing alcoholic beverages or the manufacture of drugs" or "is written in code." See Pet. at 3-4, n.3.

publications or correspondence. In fact, a survey of the recent case law indicates several instances in which the courts have upheld prison censorship under the standards announced in Martinez.

In Vodicka v. Phelps, 624 F.2d 569 (5th Cir. 1980), the court, applying the Martinez test, held that a regulation barring the reading by prisoners of publications that constituted an "immediate threat to the security of the institution" was not unconstitutional facially, or as applied, to a newsletter that approved of a prior inmate work stoppage by inmates at the prison. Id. at 570-575. Accord: Espinoza v. Wilson, 814 F.2d 1093 (6th Cir. 1987) (ban on reading of homosexual publication upheld on security grounds); Travis v. Norris, 805 F.2d 806 (8th Cir. 1986) (ban on publication entitled "Gorilla Law" upheld because it advocated violence); Carpenter v. State of South Dakota, 536

F.2d 759 (8th Cir. 1976) (exclusion of sexually explicit material). See also, Murphy v. Missouri Department of Corrections (upholding regulations under Martinez); Meadows v. Hopkins, 713 F.2d 206 (6th Cir. 1983) (upholding regulations under Martinez).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1987

EDWIN MEESE III, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS

v.

JACK ABBOTT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

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REPLY MEMORANDUM FOR PETITIONERS

1. Respondents' principal argument in opposition to the petition (Br. in Opp. 9-15) is that this case is not ripe for review. Respondents point out that the court of appeals has remanded the case for further proceedings, at which the district court is to examine the individual publications introduced by respondents at trial (see Pet. 5) to determine whether the Bureau of Prisons (BOP) properly withheld those publications under the "appropriate test" (Br. in Opp. 13). That approach, however, would achieve little and would be very burdensome to the BOP. The critical issue in this nationwide class action is not whether the particular publications introduced at trial should be admitted into federal prisons, but what the "appropriate test" for admitting publications in general should be—the heightened scrutiny standard of *Procunier v. Martinez*, 416 U.S. 396 (1974), or the reasonable relationship test applied by this Court in *O'Lone v. Estate of*

Shabazz, No. 85-1722 (June 9, 1987); *Turner v. Safley*, No. 85-1384 (June 1, 1987); and several other cases (see Pet. 9 (citing cases)). If, as we submit (Pet. 12-17), the court of appeals evaluated the BOP's regulations under the wrong standard, postponing review until after the remand has been completed would result in a waste of judicial resources and an unnecessary delay in resolving the important legal issue presented in this case. During the period of delay, all federal prisons would be forced to comply with the *Martinez* standard in determining whether to admit the thousands of publications that are presented for the BOP's review every year. That course would give rise to the very security risks that prompted the filing of this petition in the first place (see Pet. 17-19).

There is likewise no merit in respondents' contention (Br. in Opp. 9-13) that review is inappropriate because various individual publications introduced at trial as examples of publications withheld by federal prisons would not be rejected today at any federal facility. To begin with, while it is true that some of those publications would now be admitted in the federal system, the BOP advises us that a number of the publications would still be excluded today, particularly if prison wardens were permitted to apply the BOP's existing regulations.¹ Thus, even with respect to the individual publications, there is still a substantial dispute between the parties that will not disappear after a remand.

¹ For example, an issue of *Drummer* magazine (Resp. Exh. 20) contains a series of photographs, drawings, and articles depicting, in explicit detail, a wide range of sadomasochistic homosexual acts. Similarly, an issue of the *NS Report* (Resp. Exh. 21), a publication of the American Nazi Party, contains various white supremacist and racist articles that glorify violent physical assaults on blacks. The BOP has not changed its position with respect to these and several other publications introduced at trial.

More fundamentally, the ultimate disposition with respect to the individual articles is only one aspect of this case. Of far more significance, the court of appeals has struck down the BOP's regulations governing the admission of publications (Pet. App. 6a-17a), holding that the district court erred in refusing to apply the *Martinez* standard. It is that holding which the government seeks to have reviewed by this Court, and that holding is plainly ripe for review.²

2. In an effort to downplay the importance of the court of appeals' decision, respondents assert that the *Martinez* standard adopted by the court of appeals is not

² Contrary to respondents' contention (Br. in Opp. 13-14), this Court's decisions do not suggest that review by this Court is inappropriate simply because the court of appeals has remanded the case for further proceedings. Indeed, that contention is undermined by this Court's most recent decision in the prison regulation area, *O'Lone v. Estate of Shabazz*, *supra*. In *Shabazz*, the Court granted certiorari despite the court of appeals' remand to the district court for reconsideration, under a heightened scrutiny standard, of the constitutionality of certain prison policies (slip op. 4). The fact that the case had not yet gone back to the district court for further proceedings was no impediment to review by this Court.

This Court's opinion denying review in *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967), upon which respondents rely (Br. in Opp. 13-14), is readily distinguishable. In that case, the petition for a writ of certiorari was addressed to the validity of contempt citations issued by the district court in a labor dispute. The court of appeals had determined that the contemnors were entitled to a trial on a contested factual issue that might dispose of the contempt citations, and the court had remanded the case for that purpose (380 F.2d 570, 581-582 (D.C. Cir. 1967)). Accordingly, in contrast to the present case, there was a possibility that the entire posture of the case would change as a result of the remand. Moreover, unlike the present case, there was no indication that on remand the district court was to make the required factual findings under a contested legal standard.

an onerous or unreasonable one (Br. in Opp. 19-22, 29-30). In that regard, respondents criticize the government for referring to the *Martinez* standard as requiring “strict scrutiny” (Br. in Opp. 19-21).

In characterizing the *Martinez* standard as one of strict scrutiny, the government was adopting the same shorthand phrase that has been used by this Court. See *Turner v. Safley*, slip op. 1, 3 (noting that both the district court and the court of appeals, in relying on *Martinez*, had applied a “strict scrutiny” standard); *id.* at 9 (rejecting claim that prison officials should be subjected “to an inflexible strict scrutiny analysis”). In any event, regardless of the phrase that is used to describe the *Martinez* standard, the fact remains that the standard is substantially more onerous than the “reasonableness” standard that this Court has applied in every post-*Martinez* case involving prison administration (see Pet. 9). As the Court recognized in *Turner*, when it refused to apply the *Martinez* standard to regulations governing inmate-to-inmate correspondence, that standard “would seriously hamper” the ability of prison officials “to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration” (slip op. 9; see *id.* at 8). In short, respondents are simply wrong in portraying the *Martinez* standard as one that does not substantially interfere with the administration of federal prisons.

3. Respondents argue (Br. in Opp. 15-19) that review should be denied because all the circuits that have addressed similar issues have applied the *Martinez* standard. While we agree that there is no direct conflict among the circuits on this issue, we submit that the pertinent decisions have failed to analyze the issue properly. As we pointed out (Pet. 15 n.9), the court of appeals decisions relied upon by the court below (all of which were rendered prior to *Turner* and *Shabazz*) do not appear to rely on the

rights of outsiders; their holdings are apparently based entirely or primarily on the rights of prisoners. In light of *Turner* and *Shabazz*, it is now clear that the rights of prisoners must be assessed under a reasonableness standard. The two post-*Turner* and *Shabazz* cases cited by respondents (Br. in Opp. 16-18) do not satisfactorily address whether strict scrutiny should apply to prison rules that have an incidental impact on outsiders.³ Because this

³ In *Valiant-Bey v. Morris*, 829 F.2d 1441 (8th Cir. 1987), the court rejected the plaintiff’s overbreadth claim and upheld the policies of a Missouri prison facility governing inmate correspondence, finding that those policies met the *Martinez* standard (*id.* at 1443-1444). The court therefore had no reason to consider whether a lower standard should be applied, and it did not cite *Turner* or *Shabazz*. To be sure, the court also held that plaintiff had sufficiently alleged that mail from a particular religious organization was improperly singled out for inspection and delayed delivery, in violation of *Martinez*. However, the court “express[ed] no opinion on the possible merits of [defendant’s] claims,” and it declined to decide whether a trial was warranted (829 F.2d at 1444). Furthermore, the court did not explain whether its holding was based on the rights of outsiders or only on the rights of the prisoner. The case therefore offers little guidance on the question presented here.

In *Lawson v. Dugger*, No. 86-5774 (11th Cir. Dec. 21, 1987), the court of appeals held that the *Martinez* standard applied to prisoners’ claims that Florida prison officials had improperly restricted their access to literature from a certain religious organization. The court’s initial opinion—which did not cite *Turner* or *Shabazz*—relied primarily on the rights of prisoners and did not analyze in any detail the rights of outsiders (see slip op. 2106, 2110-2112). In its opinion denying rehearing, *Lawson v. Dugger*, No. 86-5774 (11th Cir. Mar. 3, 1988), the court distinguished *Turner* and *Shabazz*, and it specifically adopted the approach taken by the District of Columbia Circuit in this case (see slip op. 2085-2086). However, the court simply assumed without discussion that the First Amendment rights of the religious group were the same as the First Amendment rights of the personal correspondents involved in *Martinez*. As we argued in the petition (Pet. 13-14), there is a critical distinction between the rights of the outsiders in *Martinez* and those of publishers or other outsiders.

is a nationwide class action binding on all federal prisons, and because the prior circuit court decisions have failed to analyze the issue properly, the absence of an inter-circuit conflict does not undermine our submission that review by this Court is warranted.

4. On the merits, respondents contend (Br. in Opp. 24-25) that the court of appeals was correct in applying *Martinez*. Yet, they do not explain how the interests of the publishers here are comparable to the interests of the outsiders in that case.⁴ As we explained (Pet. 13-14), there are substantial reasons for drawing such a distinction. Similarly, respondents do not explain how their position can be squared with various decisions of this Court subsequent to *Martinez* that have applied a reasonableness standard even though the rights of nonprisoners were involved (see Pet. 14-15).

There is likewise no merit to respondents' claim (Br. in Opp. 25-28) that this Court's cases involving nonpublic forums are inapposite because the BOP's regulations are not "viewpoint-neutral." To begin with, the BOP regulations, as written and as applied, are concerned solely with publications that threaten security, discipline, or good

⁴ Respondents note (Br. in Opp. 25) that "[i]t is ironic" that the government "seeks a lower level of constitutional protection for newspapers and other publications than for personal correspondence." But this Court in *Martinez* drew precisely such a distinction by specifically leaving open the question presented here (i.e., whether a different standard applies in the case of mass mailings) (see 416 U.S. at 408 & n.11; Pet. 12). Respondents' suggestion (Br. in Opp. 24-25 n.10) that the publications at issue here are not the kind of "mass mailings" referred to in *Martinez* is based on an erroneous reading of that decision. The Court was clearly drawing a distinction between "direct personal correspondence" and items that are sent to many people, such as the publications at issue here (see 416 U.S. at 408 & n.11).

order (see Pet. App. 22a). Indeed, the regulations expressly provide that "[t]he Warden may *not* reject a publication solely because its content is religious, philosophical, political, social or sexual, or *because its content is unpopular or repugnant*" (*ibid.* (emphasis added)).⁵

Furthermore, respondents are simply wrong in contending that, even in nonpublic forums, *any* restriction based on content requires strict scrutiny (Br. in Opp. 25-28). For instance, in *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977), the Court upheld, under a reasonableness standard, prison restrictions on bulk mailings from unions, even though similar restrictions had not been imposed on bulk mailings from the Jaycees, Alcoholics Anonymous, and the Boy Scouts (see *id.* at 133). Clearly, the prison was drawing distinctions based on content by restricting only union-related bulk mailings, yet the Court refused to apply strict scrutiny in that setting.⁶ In the present case, because a prison is clearly not a

⁵ Respondents err in suggesting (Br. in Opp. 27) that petitioners have conceded (or that the court of appeals found) an intent to suppress expression because of a disagreement over content. Our statement that the regulations are "content-related" (Gov't C.A. Br. 33) can in no way be read as a suggestion that the regulations allow the suppression of speech merely because the BOP disagrees with the particular point of view expressed. Indeed, we specifically noted that the regulations had "the viewpoint-neutral purpose of safeguarding institutional security" (*ibid.*).

⁶ See also *Hazelwood School District v. Kuhlmeier*, No. 86-836 (Jan. 13, 1988), slip op. 9 (holding that the high school newspaper at issue was not a public forum and that "school officials were entitled to regulate the contents of [the newspaper] in any reasonable manner"); *Greer v. Spock*, 424 U.S. 828, 831, 838-840 (1976) (upholding regulations prohibiting partisan political speeches on a military base, even though access to the base had been granted to nonpartisan speakers and groups); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (upholding city's ban on political advertisements in rapid transit system because advertising space on a transit system

public forum, *id.* at 136; see also *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), and because the regulations at issue do not restrict publications based on the BOP's disagreement with a particular viewpoint, a reasonableness standard should apply. See generally *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

The petition for a writ of certiorari should be granted.
Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1988

is not a public forum and because the restriction was based on legitimate concerns involving, *inter alia*, claims of favoritism that would most likely arise in the allocation of limited space).

(6)
No. 87-1344

Supreme Court, U.S.
FILED
JUN 30 1988
JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

EDWIN MEESE III, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS

v.

JACK ABBOTT, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED

FEBRUARY 10, 1988

CERTIORARI GRANTED APRIL 25, 1988

137/198

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1344

EDWIN MEESE III, ATTORNEY GENERAL
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*ON WRIT OF CERTIORARI TO THE
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* The opinions of the district court and the court of appeals are printed in the appendices to the petition for a writ of certiorari and have not been reproduced.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

RELEVANT DOCKET ENTRIES

Date	Proceedings
5-29-73	Complaint, appearance filed.
12-5-73	ORDER denying motion of defts. to dismiss complaint. (Signed 12-5-73)
1-30-74	ANSWER by defts. to complaint.
3-4-74	MOTION by pltfs. for certification that this case may be maintained as a class action.
6-7-74	ORDER granting motion of pltfs. for certification as a class action, and directing that case not be maintained as a class action for determining damages.
4-14-78	MOTION of pltfs. to add party pltfs.
8-15-78	OPPOSITION of defts. to pltfs.' motion to add pltfs.
8-25-78	REPLY of pltfs. to defts.' opposition to motion to add party pltfs.
9-1-78	ORDER granting motion of pltfs. to add The Prisoners' Union, Weekly Guardian Associates, and The Revolutionary Socialist League as party pltfs. provided no additional pleadings be filed on account of the additions. (Signed 8-31-78)
6-15-79	MOTION of defts. to dismiss publisher pltfs. pursuant to Rule 12(b)(6); memo of points and authorities.
6-28-79	RESPONSE of pltfs. to defts.' motion to dismiss the publisher pltfs.

Date	Proceedings
6-29-79	REPLY of defts. to pltfs.' response to defts.' motion to dismiss the publisher pltfs.
8-10-79	MOTION by pltfs. to sever the damage claims and to stay proceedings relating to the damage claims.
10-23-79	ORDER filed 10-18-79 denying motion of defts. to dismiss publisher pltfs.; directing that individual damage claims be severed from Rule 23(b)(2) claims for injunctive relief; staying discovery proceedings relating to individual damage claims pending resolution of claims for injunctive relief; and various discovery orders.
5-18-81	MOTION by defts. to dismiss complaint argued and denied.
5-18-81	TRIAL by Court begun; continued until 5-19-81 at 9:30 a.m.
5-19-81	TRIAL by Court resumed; continued until 5-20-81 at 9:30 a.m.
5-20-81	TRIAL by Court resumed; continued until 5-21-81 at 9:30 a.m.
5-21-81	TRIAL by Court resumed; continued until 5-22-81 at 9:30 a.m.
5-22-81	TRIAL by Court resumed; continued until 5-26-81 at 1:45 p.m.
5-26-81	TRIAL by Court resumed; continued until 5-27-81 at 9:30 a.m.
5-27-81	TRIAL by Court resumed; continued until 5-28-81 at 9:30 a.m.
5-28-81	TRIAL by Court resumed; continued until 5-29-81 at 9:30 a.m.

Date	Proceedings
5-29-81	TRIAL by Court resumed; continued until 6-5-81 at 9:30 a.m.
6-5-81	TRIAL by Court resumed and concluded. Finding: taken under advisement. Counsel to submit findings of fact and conclusions of law within thirty (30) days after receipt of transcript.
9-13-84	MEMORANDUM OPINION. BRYANT, J.
9-13-84	ORDER directing that defts. and their agents and successors are permanently enjoined from enforcing or applying the regulations now published at 28 C.F.R. 540.13(a), 540.14(a)(2), 540.14(a)(6), and 540.14(a)(7); directing that in all other respects judgment is entered for the defts.
10-5-84	NOTICE OF APPEAL by pltfs. from Order entered 9-13-84.
10-10-84	PRELIMINARY RECORD transmitted to U.S. Court of Appeals.
11- 9-84	CROSS-NOTICE OF APPEAL by defts. from Order entered 9-13-84.
11-13-84	PRELIMINARY RECORD transmitted to U.S. Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RELEVANT DOCKET ENTRIES

Date	Proceedings
10-18-84	Copy of notice of appeal and docket entries from Clerk, U.S. District Court for the District of Columbia.
1-23-86	ARGUED before Edwards, Ruth B. Ginsburg, Circuit Judges and Thomas E. Fairchild, Senior Circuit Judge, U.S. Court of Appeals for the 7th Circuit, sitting by designation.
7-28-87	Opinion for the Court filed by Senior Circuit Judge Fairchild.
7-28-87	Judgment by Court of Appeals that the judgment of the District Court appealed from in this case is hereby affirmed in part, reversed in part, and this case is remanded in accordance with the Opinion for the Court filed herein this date.
7-28-87	Mandate order.
7-28-87	Per Curiam order, sua sponte, that the Opinion for the Court filed by Senior Circuit Judge Fairchild on July 28, 1987 be, and hereby is amended at page five, seventh line from the bottom, by deleting the word "services" and inserting in lieu thereof the word "activities."
10-13-87	Per Curiam order denying appellees' petition for rehearing. Edwards and Ruth B. Ginsburg, Circuit Judges and Fairchild, Senior Circuit Judge, U.S. Court of Appeals for the Seventh Circuit, sitting by designation.

Date	Proceedings
10-16-87	MANDATE ISSUED.
4-27-88	Certified copy of order from Clerk, U.S. Supreme Court, granting the petition for a writ of certiorari in S.C. No. 87-1344 on 4-25-88.

EXCERPTS OF TRIAL IN
ABBOTT, ET AL. v. RICHARDSON, ET AL.

WASHINGTON, D.C.
TUESDAY, MAY 19, 1981

* * * * *

[98]

PATRICK McMANUS

was called as a witness by the plaintiffs, and having been first duly sworn by the deputy clerk, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

Q: Mr. McManus, what is your present position?

A: I am Secretary of Corrections, that is, Director of Corrections for the State of Kansas.

* * * * *

[147] Q You were describing earlier some of the causes of violence in prison. You mentioned gambling debts as one of them. Are there other causes of violence?

A There are a lot of causes of violence. Currently one that is plaguing nearly everyone is the whole issue of overcrowding, which aggravates the loss of privacy and the loss of an ability to withdraw from the general population into a space that is your own. I think this over a time creates a tremendous tension. And, again, as the prisons become more overcrowded, those kinds of tensions become greater.

I think homosexuality and some of the spin-offs from relationships certainly can be a cause for violence inside a prison.

* * * * *

[167] Q Are you familiar with the Bureau of Prisons rule, which we've called in this case the all-or-nothing rule?

A Yes, I am.

Q And what does that rule require?

A I think basically it says if any piece of a publication is objectionable, then the whole publication is to be kept out of the institution.

Q And do you have an opinion as to whether or not that serves any security interest?

A Well, I don't know that it serves a security interest. I think it's certainly an administrative convenience matter in that you don't have to snip the particularly offensive part out. And there may even be an issue about an inmate being more angry getting a document in that's been cut up than being told he's not going to get it at all.

I guess my solution would be that we give the inmate a choice. If he wants the piece cut out and receive the rest of the publication, then, fine. If he'd just as soon that we didn't mess with it, that would be fine also.

* * * * *

[208] Q Mr. McManus, do you have before you Plaintiffs' 17 and 18? Number 17 is the rejection letter about The Labyrinth, and Plaintiffs' 18 is the issue that was rejected.

A Yes.

Q Do you have those?

A Yes.

Q All right.

Now, in the rejection letter, Plaintiffs' 17, it states that it was rejected from Marion because "we believe the article entitled 'Medical Murder' would be detrimental to the good order and discipline of this institution.

"The basis for our decision is that this type of philosophy could guide inmates in this institution to situations which could cause themselves and other inmates problems with the medical staff."

Have you read the article entitled "Medical Murder"?

A. Yes, I have.

Q. And have you formed an opinion as to whether or [209] not you agree or disagree with that statement and whether the publication is a threat to security or discipline at an institution?

A. Well, again, I would fail to see where it would be a threat to security. Whether or not people reading that would get angry at medical staff and find themselves in conflict with medical staff is speculation, and a kind of a stretched speculation as far as I am concerned.

But in any case, I would not see the basis for keeping the publication out of the institution.

Q. And would you allow that into the maximum security institutions in Kansas?

A. Yes.

Q. Suppose the publication we are talking about was criticizing the medical practices at the Kansas penitentiary at Lansing. Would you allow it into the Lansing penitentiary?

A. Yes.

Q. [sic] As a matter of fact, we have an inmate publication, an in-house publication that routinely criticizes the medical center at the penitentiary.

Q. And have you had any untoward incidents as a result of the existence of that publication at the penitentiary?

A. None.

Q. And you said you have read some of the depositions in this case. Did you see any evidence from the

depositions [210] that any of the publications in this case presented any problem at any institution?

A. I could find none from the depositions that I read, some of which I have read completely and others which I have skimmed; but I found no indication that that kind of behavior resulted from the introduction of the publications.

Q. If I told you Mr. Norman Carlson, the Director of the Bureau, stated that he felt that the whole tenor of the publication tends to raise issues which may or may not be true; an inmate may tend to believe the article on the lack of medical attention causing murders of inmates, and that can stimulate actions which can cause problems, would that change your opinion?

A. No, it would not.

Q. Do you have before you *Hustler Magazine*, . . .

A. Yes.

Q. . . . marked as Plaintiffs' 19?

A. Yes.

Q. Have you had occasion to review that?

A. Yes.

Q. Can you state that that contains some fairly explicit sexual material?

A. Yes, it does.

Q. It contains material of a sadomasochistic nature?

A. Yes, it does.

[211] Q. Does it contain some material containing bestiality?

A. Yes, I believe it does.

Q. And would you exclude that publication from any of the maximum security penitentiaries in Kansas on security grounds?

A. No.

Q. Would you exclude it on any other grounds?

A. No.

Q. Is it available then to inmates in the Kansas system?

A. Yes, it is.

Q. If the evidence in this case were to show that *Hustler* Magazine has been excluded at Atlanta and Lewisburg but is sold in the commissary at the institution at Marion, what opinion would you form?

A. Well, the opinion that has come up before, and that is that either the policy is so vague as to be lacking in direction for a warden-making decision what to keep out; or, at the very least, that the warden trying to interpret the policy coming up with a quite contrary solution.

Q. Well, is there any basis, any distinction, between, let's say, the institution at Marion, which is a level VI, the maximum maximum-security institution in the Bureau of Prisons, and the institutions at Leavenworth and Lewisburg, which exclude some issues of *Hustler*—is there a distinction that makes any difference that would support those differences [212] in policies?

A. I cannot conceive of a difference in those institutions that would account for allowing it in one and not allowing it in the other.

Q. Suppose the chairman of the incoming publications committee at Marion who signs the rejection letters at that institution tried to explain the difference in the following way: that Marion has single cells and has a high staff-to-inmate ratio; whereas Atlanta has more freedom of movement and, therefore, needs more control of literature; Marion has more sophisticated inmates and they do not play the little games they play at other institutions.

THE COURT: Do what?

MR. NEY: He says that they don't play the little games they play at other institutions.

THE COURT: More sophisticated inmates?

MR. NEY: At Marion.

Therefore, he says, they could receive it at Marion, which is a higher security level than Atlanta.

BY MR. NEY:

Q. Does that make any sense to you?

A. It doesn't make any sense.

If anything, I suppose I have heard the argument made when you have higher-security level and higher-security people and more sophisticated, a word we love to use, that [213] we need more control.

I never quite heard the argument used to the contrary—that the more sophisticated the inmates, the less control we have over the publications.

I think that is really stretching for a reason. But as I say, I would find it inconceivable that there would be differences between one institution and another that would justify *Hustler* coming into one and not coming into the other. I don't know what those differences would be.

* * * * *

[216] THE COURT: Dr. Wolfgang said yesterday that many of the people in the penitentiaries have a limited repertoire of reactions to different things and they are very defensive, and that is one of the reasons why they find themselves in jail.

And then when they get in jail and they have got a lot of them packed tight, the situation which led to their being there becomes exacerbated to some extent.

Nor [sic], if this publication [NS Report, P. Ex. 21] is offensive to you, don't you think it probably would be more offensive and may lead to a more demonstrative reaction to somebody who is in a penitentiary where I understand racial strife is a real problem?

Now, I follow you, but it seems to me that unless somebody told me, unless somebody could give me a very, very good case, if I were running an institution and I had a fair

amount of strife in my institution, fights, that obviously had some racial overtones, I just would not like to have this in there.

I mean here we are. You have people out in the street, for instance. These people wanted to parade out [217] someplace in Illinois and had a permit to do it. And the townspeople almost had to call—they called the National Guard out to keep order; and those people are free.

THE WITNESS: Yes.

THE COURT: Now, how do you account for it?

THE WITNESS: Well, if there is a publication that I would want to hinge [sic] my bet on, this is the one or this kind. And let me explain the reason.

I am still not sure that the presence of a publication like this in and of itself is going to alter behavior.

I think if there is a case somewhere where the tensions in a prison are apparent, it is along racial lines.

THE COURT: Sure, I mean if you have got a fire,

THE WITNESS: This panders to and capitalizes on that hatred and viciousness.

THE COURT: Sure it does.

THE WITNESS: So in my judgment—and, again, I can't prove this; so I suppose this is a weakness; I shouldn't say this, but I am going to say it anyway because I think it's true—in my judgment, this kind of interracial agitation, which is frankly what this is, both in terms of the people who subscribe to this philosophy as well as those who are obviously the victims of it or the opponents of it, in either hand it would tend to generate.

Perhaps in the hands of blacks and Jews and other [218] groups that this Nazi Organization was after, the danger in the prison may well be more than—it would in their hands and they would begin to feel the full wrath of the vengeance that this thing reeks of.

THE COURT: Here you have got a demonstration and somebody parades down in North Carolina, and five or six people end up getting killed.

THE WITNESS: Yes.

THE COURT: It seems to me that if the fires of animosity are smouldering, no matter to what extent they are subdued, this would be like throwing three or four gallons of kerosene on a fire.

THE WITNESS: As I mentioned, our practice with this particular one is to scrutinize it very carefully and be very careful with the content of it.

I agree with you that this is—of all the publications that we have looked at, not this particular one, I suppose, but that particular ilk, which not only advocates something unpopular or not only advocates organization of inmates—not only advocates things, but advocates a kind of racist vengeance—and it is not just a question of anger and hostility, as I think is the case of some of the other publications that we talked about—they were even more descriptive of reality and more venting of that feeling and that anger and that hostility.

* * * * *

WASHINGTON, D. C.
WEDNESDAY, MAY 20, 1981

* * * * *

[329]

JOHN CONRAD

was called as a witness by the plaintiffs, and having been first duly sworn by the deputy clerk, was examined and testified as follows:

* * * * *

[330] DIRECT EXAMINATION

* * * * *

Q: Mr. Conrad, could you describe your present position?

A: I'm employed by the American Justice Institute in Sacramento, California.

Q: And what kind of work do you do there?

A: Research and some training.

* * * * *

[356] Q. What are the other causes of violence [in prisons]?

A. Unquestionably sex is a problem in a prison. The frustrations of control and the frustrations of the absence of the opposite sex creates violence.

The prevailing level of homosexual activity, which varies from institution to institution and varies from culture to culture, is a source of violence.

In many state prisons—I don't think this is a problem as yet in the Federal Bureau of Prisons—there's a tremendous amount of violence that is generated by ethnic hostilities and by ethnic gangs.

Problems brought about by gambling and prisoner predation on each other is a constant source of violence.

I think I've covered some of the major causes.

* * * * *

[398] Q. I'd like to show you some publications which have been excluded from the Bureau of Prisons and obtain your opinions about them. I'll first ask you to focus on what's been marked as Plaintiffs' 29, *While There Is A Soul In Prison*, called *The 1979 Peace Calendar*.

Your Honor, do you have a copy?

THE COURT: No.

(Mr. Ney passing up a copy to the court.)

BY MR. NEY:

Q. The rejection letter for that publication is contained in Plaintiffs' 28. And I'll just read to you the reason for the rejection from Atlanta on October 6, 1978.

It states: "This publication has been determined to present a danger to the discipline, good order and security of this institution since it encourages prison strikes." And have you had a chance to examine that publication?

A. Not in detail. I don't recall that it encourages prison strikes. The letter which is before me here does [399] not say which item in here does encourage prison strikes.

Q. I'm going to show you certain portions of it which you were shown previous to this testimony and ask you if you've read those pages.

For the record, I would indicate that the witness was shown the page opposite the entry for March 19 through 25, and the following page, which is opposite March 26 through April 1, the page following, April 2 through 8, and the following page next to April 9 through 15, the page opposite May 21 through 27, May 28 through June 3, the page opposite June 4 through 10, June 11 through June 17, June 18th through 24, July 23 through 29, July 30 through August 5, August 6 through August 12, October 8 through October 14, and October 15 through October 21. Are those the portions that you examined, Mr. Conrad?

A. I've not examined all of this, Mr. Ney. I hesitate [sic] to testify in any detail about them.

Q. What about the portions that I've just listed.

A. I haven't examined all of the portions you've just listed there, however, those that I have examined are rather poetic statements about the hardships and the

deprivations in prison and encouraging inmates to assert their humanity in spite of the deprivations which they are exposed to.

I see no reason why this kind of publication should be excluded. I doubt very much whether it would be widely [400] read in any institution. And most of it is in very highfalutin language and very remote from the concerns of an inmate at Atlanta.

For example, the sufferings of a woman suffragette in a British Prison in 1909 are hardly the sufferings which an Atlanta prisoner would be subjected to or could relate to.

Q. And are you, therefore, saying that this publication does not present a threat to Atlanta?

A. No, it's sort of poetic grumbling, I think, which might have the advantage of being grumbling of a more elevated nature than ordinarily occurs in prison, but Atlanta is a big strong maximum-security institution and hardly needs that kind of protection from a publication of this kind.

Q. Do you see this being a treat [sic] to any prison within the Federal Bureau of Prisons?

A. No, I don't. I really don't.

* * * * *

[405] Have you had a chance to review *Hustler Magazine*, Plaintiffs' 35?

A. I'm afraid I have, Mr. Ney.

Q. And do you have an opinion as to whether that publication constitutes a threat to security, good order or discipline of any institution in the Bureau of Prisons?

A. It's a very repellent publication and I don't like it, But I can't think of any reason for excluding it which would not exclude a great many more legitimate magazines. I don't see that it threatens the security of the

institution, or is likely to corrupt the morals of those who read it any worse than they're corrupted already.

Q. Does that publication, to your knowledge, contain some depictions of bestiality?

A. What?

Q. Does it contain some bestiality—depictions of bestiality?

A. It seems to depict an act of bestiality. It's a little unclear as to whether it really does, but I take it that it does.

Q. I'm talking in particular about page 27.

A. Yes. I think it's a very unpleasant and disgusting pictures [sic], but I see no very good reason to exclude it which wouldn't apply to more legitimate magazines.

[405A] Q. I want to show you *Playboy Magazine*, Plaintiffs' number 36. Have you had a chance to look at that?

A. Yes, I saw that.

Q. And did the *Playboy Magazine* on pages 145 and 146 contain depictions of sadomasochism?

A. Well, I guess that's the best description of it. Sadomasochism.

Q. And did you find those to be a basis for rejecting that publication as a threat to the security of a Bureau of Prisons institution?

A. I have a special reason for feeling that sadomasochism is on the questionable list, which I previously discussed—is a questionable practice—a questionable kind of publication to admit. It has nothing to do with the security of the institution. It has the capability of encouraging future felonious sexual activity, which sadomasochism does lead to.

I think it's very unlikely that the kind of sadomasochism depicted in *Playboy* or some of the other journals I've seen can be successfully practiced in prison, the conditions of

privacy being what they are and the conditions of control being also what they are.

But I think it's objectionable for a public institution to disseminate or legitimate in any way publications which can tend to lead to felonious behavior after release.

[405B] I think this is the case with two kinds of sexual publications, the sadomasochistic publications —

THE COURT: Let me see what you're talking about. (Passing to the court.)

THE WITNESS: I don't think this is nearly as serious as some of them. The sadomasochistic publications and the publications showing child pornography—both of those, I think, have felonious implications, certainly in the case of child pornography and in general, I think, in the case of sadomasochism. And *I think the Bureau is well advised to be very conservative about admission of such publications.*

BY MR. NEY:

Q. Are you aware that the Bureau sells *Playboy* in the commissaries of virtually all of its institutions and that *Hustler Magazine* is sold in a number of institutions?

A. Yes, I know that. And I suppose that those journals being what they are and the possibility of those two particular kinds of articles being admitted in or published in those journals, it would be well for someone in the institution to see what's in them before they're distributed.

I think this is particularly the case in the case of *Hustler*, but I'm a little surprised to have found that article in *Playboy*, which I had understood does not feature that kind of material.

* * * * *

[410] ALLYN SIELAFF, ESQ.,

called as a witness by the plaintiffs, after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

Q. Mr. Sielaff, what is your current position and profession?

A. I am an attorney in private practice. I am also a director of criminal justice studies at a small college in Northeastern Ohio, Lake Erie College.

* * * * *

[441] THE COURT: I suppose that in some of these institutions that you have supervised, unfortunately for all of us, some of our problems in the street are transported into the institution.

And it is my understanding that a great deal of conflict—well, at least some amount of conflict—in institutions has obvious racial overtones.

THE WITNESS: Yes, sir.

THE COURT: This is a problem, I understand, throughout the system. Now, is that so?

THE WITNESS: That is definitely so.

THE COURT: All right.

Well, now, there is a publication around here. . .

THE COURT: Where is that publication you had yesterday that was a Neo Nazi publication?

MR. NEY: I am sure it is up here, Your Honor.

[Mr. Ney and the Deputy Clerk look for the exhibit in question.]

[442] [The publication is handed to the court.]

THE DEPUTY CLERK: Plaintiffs' number 21.

THE COURT: Have you ever seen this publication? [The exhibit is handed to the witness.]

THE WITNESS: Yes, I have, Your Honor.

THE COURT: Where?

THE WITNESS: I think it is a publication that Mr. Ney had furnished me, and I have seen a lot of Neo Nazi publications, if not this one, like it.

THE COURT: If you were a warden at a penitentiary and you had this kind of trouble I am talking about, would you let that in your institution?

THE WITNESS: All right.

I think I would answer your question this way: that normally this kind of publication or those like it representing other extremist points of view are not going to cause a problem.

Where you do have a great deal of racial conflict, then if I were a warden, I would like to have the opportunity to exercise my discretion on an exceptional basis and have this excluded.

THE COURT: All right.

THE WITNESS: But as repulsive as this is to me and to others, in many institutions this simply is not going to cause a problem, given the set of facts that you have racial conflict.

[443] You know, at that point, I think that I would like to be able to exercise my discretion as a warden.

THE COURT: If you have a particularly tense situation?

THE WITNESS: Yes, sir; yes, sir.

And I can think of one that we had in Illinois, Menard, where we had members of the Chicago street gangs. This is an institute in the southern part of Illinois. There were members of Chicago street gangs, Neo Nazis and Klansmen, whites in southern Illinois—all in the same institution and rather balanced in terms of numbers.

Now, that is a potentially incendiary kind of a situation. That is where I think a warden ought to be able to exercise some discretion and exclude something like this or the KKK-type publication.

But in many institutions where there is sufficient harmony, people who subscribe to this are in the minority and, as a result of peer pressure, really nothing is going to happen.

THE COURT: All right.

BY MR. NEY:

Q. Has this publication or the *N-S Report* or something similar come into institutions when you were in Illinois?

A. Yes.

Q. And to your knowledge, it did not cause any problem?

[444] A. Yes, to my knowledge, it did not.

Also to my knowledge, I believe we had on occasion, given the kind of situation that the judge characterized and given my recollection of Menard, exercised some discretion in excluding publications as well.

* * * * *

[446] Q. And do you see any security threat posed by *Hustler* magazine?

A. I do not see any security threat, nor do I know of any security threat posed by *Hustler* magazine.

Q. All right.

Do you understand any rationale that the Bureau of Prisons would have for selling *Hustler* Magazine at Marion and excluding other issues at other institutions?

A. No, that would be very difficult for me to comprehend.

Q. Some of the Bureau people claim that they have more sophisticated kind of inmates at Marion than at . . .

A. I do not see that as [a] legitimate rationale.

* * * * *

[449] THE COURT: Well, do prison administrators believe that prison homosexual activity in institutions is a breeding ground for violence and . . .

THE WITNESS: No question about that being true, Your Honor.

* * * * *

CROSS-EXAMINATION

[485] Q. Other than the Neo Nazi materials that you might reject at an institution with heightened tensions, are there any other publications that you believe are appropriately rejected from an institution?

A. Well, child pornography material.

Q. Does that present a security problem?

A. I don't think it presents a security problem. I think it may be illegal. If it is not illegal, it's objectionable on other bases.

But I must confess that would be apart from security; it would be more on personal grounds.

[Pause]

THE WITNESS: I think, you know, one might justify it on security, I suppose, because we know that child molesters, for example, are, generally speaking, those who are held in greatest disrepute among inmates themselves. And that kind of identification might very well cause a security risk to be presented.

[486] I think one might make that kind of an argument; but, certainly, I would find some other argument to exclude that.

Q. What do you mean by "identification argument"?

A. I think that in the case of individuals who are child molesters and who do not go around institutions flaunting that they are child molesters—and I think probably you are going to the homosexual identification theory.

My point of view is that as far as homosexuals are concerned, on the one hand, they identify themselves.

Child molesters may not overtly identify themselves, and there might be a greater opportunity for that happening if they were to receive this material.

In other words, there might be that line of argument that could be used from a security standpoint, child molesters, being looked down upon as the lowest rung on the ladder among criminals, receiving that material.

Q. You say it could be used to identify child molesters, but it would not be used to identify homosexuals?

A. I don't think so.

Again, based upon my experience, homosexuals just identify themselves through overt kinds of characteristics we've talked about today, verbally, and otherwise. They really don't need any form of identification.

Q. Are there any closet homosexuals in prison?

[487] A. I suppose so. There are also people who did not practice homosexuality on the outside; but when they got in the prison environment under pressure, practiced homosexuality.

Q. What do you mean "pressure"?

A. Well, it is well known that there are wolves in any population in a prison, those inmates who are stronger and tend to prey on others who are weaker.

And sometimes, from a standpoint of just exerting power—although sex is involved, there seems to be more of a power kind of thing. They're wolves.

And others who are weaker, regardless of whether they practiced homosexuality on the outside, may very well be subjected to that kind of sex activity because of that prison circumstance.

Q. How would you identify the weaker inmate?

A. How would I?

Q. How could the weaker inmate be identified?

A. Just by stature, by physical appearance; a stronger, more powerful, individual might exert influence on that individual that causes or may cause a homosexual relationship to occur.

Q. Could that inmate be identified by virtue of the fact that he had secreted a homosexual publication?

A. Okay.

He could but I really think that is far-fetched.

* * * * *

[502] Q. Let me ask you to look at the front page of that publication [*The Torch*, P. Ex. 37]

A. (Complying) Yes.

Q. It speaks to or the headline is "United to Smash the Nazis and the KKK."

Would that article cause you to reject the publication?

A. No.

Q. Would it cause you to reject the publication at Menard where you had the gangs, Neo Nazi and Ku Klux Klan gangs?

A. Well, this is not—you know, this is not a paper that's identified with race; and so we were dealing with a racial situation.

And this is a socialist newspaper or a newspaper which espouses socialism.

I guess I would—that would be that one exceptional area where something like this would need to be evaluated.

And depending upon the facts in that given hypothetical, that is where you might want to make an exception or allow [503] the warden the discretion of recommending to the director an exception to be made.

But I just can't sit here in a blanket way and say yes or no, really, to your question.

Q. But you can say that the warden at Menard should have the discretion to decide whether or not this article relating to the Nazis and the Ku Klux Klan should be rejected?

A. No, I don't believe that the warden should have the entire discretion.

I think that he should have the discretion of making a recommendation so that it is subject to review.

A paper like this in an institution other than one that has the racial conflict that we spoke of as a hypothetical constitutes no security problem.

In fact, few inmates care about this stuff; most of it is boring after a time; and it certainly has nothing to do with security.

Given our hypothetical, the warden ought to be able to have the discretion to evaluate this, however, in a racially tense situation and communicate to the director or somebody higher up as an exception being made in excluding it.

That is what I believe the process ought to be.

Q. So you can envision some circumstances, maybe Menard where there is a Ku Klux Klan and Neo Nazi, that this publication might be rejected?

[504] A. I can envision through my own experience one circumstance where, yes, this might be rejected.

* * * * *

WASHINGTON, D.C.
THURSDAY, MAY 21, 1981

* * * * *

[518] JOHN CONRAD

resumed the witness stand, and having been previously duly sworn, was examined and testified as follows:

CROSS-EXAMINATION

* * * * *

[546] Q. I direct your attention to paragraph #3-B on page #1. In particular I would ask you to read the second sentence.

A. #3-A?

Q. #3-B.

A. #3-B.

The second sentence says: "The warden may not reject a publication solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant. Publications which may be rejected —"

[547] Q. Just the second sentence.

A. Okay.

Q. Do you understand that although the warden has discretion to reject certain publications, this sentence is a prohibition against him rejecting publications solely because the content is religious, philosophical, political, social or sexual?

A. Yes. The word "solely" is the operative word there. He can't reject, let's say, the Hustler Magazine because it is repugnant and has a sexual motive. He has to find something else in the Hustler that would be contrary to good order.

Q. Do you think that is a useful limitation on his discretion?

A. Well, my position, Mr. Dutterer, is that publications have — from a vast amount of experience that has accumulated in operating correctional institutions — publications have very little influence, if any, in actions prejudicial to discipline. And, consequently, I would prefer to have a very limited list of prohibitions. Prohibitions of literature having to do with the construction of weapons I think is an obvious exception.

My opinion is that if I were a warden or the Director of the Bureau of Prisons I would prefer to prohibit any literature having to do with child pornography or sado-masochism because [548] that is felonious behavior and should not be circulated in an inmate body. It shouldn't be

circulated anywhere, in my opinion, but certainly not in an inmate body.

Q. What are some of the difficulties of circulating that type of material in an inmate body?

A. I think it creates an insoluble conflict, which I don't think the warden should be subjected to. The conflict is simply this: He is putting himself in a position of saying that here is sado-masochistic literature or child pornography or something like that, you can read it, and it doesn't make any difference to me. Well, it does make a difference. This is literature that encourages behavior which in most states is felonious.

Q. Would that give the inmate the impression that the Bureau or the Warden was approving of that type of activity?

A. It would give the impression that the warden is indifferent at least to the circulation, indifferent to that type of activity.

I said this is my position. I think there are quite a number of people that disagree with me about it.

Q. Well, couldn't the same thing be said if a warden permitted in a neo-Nazi publication?

A. I would prefer to keep neo-Nazi publications and Ku Klux Klan publications out of the institution too. But on a somewhat different ground, however.

[549] Q. What is that ground?

A. In that area I take this position, Mr. Dutterer: that that kind of literature is offensive to a very large number, sometimes the majority of the inmates in an institution. For example, the Ku Klux Klan, which is highly offensive to black inmates. It is a needless affront to black inmates to allow the literature to circulate in the institution and I see no reason why it should be. It also brings into disrepute, I think, a reputation of the Bureau for fair deal-

ing with minorities. And if I were Director Carlson I would refuse to admit that kind of material or allow that kind of material to be admitted in any institution.

Q. So, there is some material—

THE COURT: Let me ask you this: Do you think it might have a negative effect on the security of the institution?

THE WITNESS: It might conceivably. I would have to say I don't know of any case where it has. But I would imagine that the free circulation of the Ku Klux Klan literature, for example, some of the literature I have seen in preparation for this testimony, would be sufficiently inflammatory so that there might be some problems with it.

However, in saying that I have to add that I have never heard of a situation in which that kind of literature has caused a prison riot or prison disorder.

* * * * *

WASHINGTON, D.C.
TUESDAY, MAY 26, 1981

* * * * *

[890] NORMAN CARLSON

was called as a witness by the defendants, and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

Q. State your name, please.

A. Norman A. Carlson.

Q. What is your present occupation and profession?

A. Director of the Federal Bureau of Prisons, Department of Justice.

Q. How long have you held that position?

A. Eleven years.

[891] Q. When did you first begin your career in corrections?

A. 1956.

Q. What was your first position?

A. I was a correctional officer at the Iowa State Penitentiary.

Q. What were some of your duties and responsibilities as a corrections officer?

A. I was a member of the correctional officer force and provided a variety of different functions, basically security of the institution, supervision of inmates and supervision of inmate programs.

Q. What was your next position in corrections?

A. I returned to the Iowa State Penitentiary and was called a sociologist.

Q. You say returned. Where had you gone in the in-between years?

A. My initial assignment, Mr. Dutterer, was while I was a graduate student at the University of Iowa. I worked one summer, approximately four months, as a correctional officer. I then returned to school and finished graduate school and then went back to the state penitentiary.

Q. What degree did you receive in graduate school?

A. Master of Arts in criminology.

Q. I'm sorry. Did you say in criminology?

A. A Master of Arts in criminology.

[892] Q. After you completed your work in Iowa, what was your next position in corrections?

A. I joined the Federal Bureau of Prisons in 1957.

Q. To what institution were you assigned?

A. The U.S. Penitentiary, Leavenworth, Kansas.

Q. What was your position there?

A. Case worker or parole officer.

Q. How long did you stay at Leavenworth?

A. Approximately two years.

Q. What was your next position?

A. I went to the Federal Correctional Institution in Ashland, Kentucky.

* * * * *

Q. You indicated that you became Director of the Bureau of Prisons eleven years ago. Was that 1970?

[893] A. That's correct.

Q. Were you appointed to that position at the time Richard Nixon was President of the United States?

A. Yes, I was.

THE COURT: Everybody since then has asked him to stay on, and he's on now.

* * * * *

[894] Q. Do you have occasion in your position as Director to talk to state correctional officials?

A. Yes, I do.

Q. Do you have occasion to talk with other experts in corrections?

A. Yes, I do.

Q. Do some of those include researchers and scholars at educational institutions?

A. Yes, it would.

Q. How many facilities are there in the Bureau of Prisons' correctional system?

A. There are 43.

Q. Are they classified according to their security levels?

A. Yes, they are.

Q. Would you explain that?

[895] A. We have six security levels. Level six is the most secure, the maximum-security institution, of which there is only one, the facility at Marion, Illinois. And they're graded down to level one, which are the minimum-security camps, such as the one at Allenwood, Pennsylvania. It's a spectrum from level six to level one, with six being the most secure and level one being the least secure.

Q. How many inmates are housed in the Federal system?

A. 25,000 today.

Q. Do you have any facilities that are classified under the category of administrative?

A. Yes, we do.

Q. What does that mean?

A. These are institutions that serve multiple functions, pretrial functions, a hospital, for example, at the medical center at Springfield, Missouri, and other institutions that would accept more than just one security level of inmate.

Q. Are these institutions spread out through the United States?

A. Yes, they are.

Q. Do the institutions house people from state systems?

A. Yes, they do.

Q. Do they house people from the District of Columbia?

A. Yes, they do.

[896] Q. Are these special arrangements that you have with the states, or are they statutory provisions?

A. The statute permits us to contract with the states upon request. We do that. At the present time, we have some eight hundred state inmates in federal institutions.

THE COURT: That doesn't include the District of Columbia.

THE WITNESS: That does not include it. There are an additional twelve hundred, approximately, District of Columbia offenders in the federal system.

BY MR. DUTTERER:

Q. What would be some of the circumstances under which you would take a state offender. Not the District of Columbia, but a state offender.

A. Most of the state offenders are difficult management problems, escape risks and seriously disruptive inmates that the states do not have the facilities to handle.

Q. Does the Bureau of Prisons provide training for their correctional staffs?

A. Yes, we do.

Q. Would you explain some of the training that's available for your staffs?

A. All new employees go through a two-week orientation program at the institution where they're hired immediately upon entering on duty. They then go to one of our two staff [897] training centers for an additional two-week in-service training before they actually report back to the institution and are given an assignment.

Q. Are there continuing educational programs and training programs throughout their careers?

A. Yes, there are.

Q. Do these continuing programs focus on current problems?

A. Yes, they do.

Q. Would that include focusing [sic] on, for example, gang problems?

A. Yes.

Q. Are gangs a problem in federal institutions?

A. Yes, they are.

Q. Is it a problem that's increasing?

A. Yes, it has increased dramatically in the past five years.

Q. Why is that?

A. I think the phenomena [sic] of gangs and terrorism that we experience in this country has permeated the prisons. I think prisons are a microcosm of society and share the same problems that you see in the outside communities.

Q. Are any of the inmates that come from the state system involved in gangs?

A. Yes, they are.

[898] Q. Is there a general characterization that you could use to describe the federal inmate, type of crime and age?

A. Not really. We cover the waterfront, all of the way from white collar and public corruption cases, down to and including some very violent aggressive acts of violence.

Q. What are some of the main challenges that face a prison administrator today?

A. The level of violence.

THE COURT: What?

MR. DUTTERER: That face a prison administrator today.

THE COURT: Main challenges you say?

MR. DUTTERER: Yes, Your Honor.

THE WITNESS: At the state level, overcrowding, of course, is by far the most serious problem. In the federal system, we're in reasonably good shape in that regard. Violence is another great concern we have. It's a challenge, of course, in terms of trying to operate institutions that are in conformity with court orders and follow the mandates that have been set down by the courts.

THE COURT: You said the states are suffering from overcrowding and you folks are in relatively better shape. [899] THE WITNESS: Yes.

THE COURT: Then you said violence. Is that both state and federal?

THE WITNESS: Yes, it is. The level of violence in federal institutions has been increasing in terms of the absolute numbers and in terms of proportion.

THE COURT: When you say "violence", what are you talking about?

THE WITNESS: In terms of homicides, stabbings, knifings, both on staff as well as on inmates.

THE COURT: You mean individual scrimmages?

THE WITNESS: That's right.

THE COURT: And then you have some rioting from time to time?

THE WITNESS: Fortunately, in the federal system, we've not experienced any major violence in terms of group disturbances or riots, but we certainly have our share of one-on-one encounters involving both inmates as well as inmates on staff.

THE COURT: Now, when you have these occurrences of violence inside the prison, the Bureau investigates that, don't they?

THE WITNESS: The F.B.I. does. That's correct, Sir.

THE COURT: Now, is there a sort of form sheet [900] on that type of thing? Inmates have a scuffle. Inmates knife one another. The Bureau moves in. Now, is there sort of an expectation on the part of the investigators to find one or two or three factors in this situation?

THE WITNESS: Yes, I think most of them—

THE COURT: Do you understand what I'm talking about?

THE WITNESS: Yes. Very definitely.

THE COURT: They say, "well, what causes this?["] What ranks, let's say, in order of frequency on a one-to-four basis, let's say. What are the general things they look for first, second, third or fourth?

THE WITNESS: I think homosexuality would probably be one of the primarily [sic] causes of inmate violence, both in terms of the parties involved, as well as a possible triangle involving a third party. Incidents where one inmate has testified against another or a friend of another in a federal court or in some state prosecution; and cases involving relationships with gangs where an inmate may have offended another gang member or a gang member's family and ergo was marked for attack because of his cooperation in that regard.

I would say those are probably the three most important contributors to violence in at least the Federal Bureau of Prisons.

[901] BY MR. DUTTERER:

Q. I show you what is Plaintiffs' Exhibits 4 and 10. These are the Bureau of Prisons' Policy Statements. I'd like to ask you first to describe the procedure that you use when implementing a new policy or revising an old policy at the Bureau such as those that are before you.

A. We have an executive staff in the Bureau of Prisons that's composed of the director and myself, the four assistant directors in Washington, plus our general counsel, and the five regional directors, who operate the five regions that constitute the Bureau of Prisons. We meet every other month, bimonthly. And all new programs or policies are reviewed by this group prior to their promulgation. In other words, draft policies are sent out in advance, and we all have a chance to review them and make comments on them at our regular bimonthly meetings.

Following those meetings, whatever changes are to be made are made, and then I sign them into effect when I return to Washington.

Q. Were the two policies in front of you formulated under that general framework?

A. Yes, they were.

Q. Now, the plaintiffs have raised a number of issues in this case, as you know, and I'd like to focus your attention on them, I believe, for your convenience and the courts' [sic], [902] one at a time.

First, I would like to ask you to look at Plaintiffs' Exhibit number 4 and direct your attention to paragraph B at the bottom of page 1 and ask you to read the first sentence, please.

A. "The warden may reject a publication only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity."

Q. Is that sentence in conjunction with the rest of the policy statement and implementing information which carries over to pages two and three, the general policy of the Bureau regarding rejection of publications?

A. Yes, it is.

Q. And in your professional opinion, does that sentence and the rest of the statement there further the maintenance of security, good order and discipline at an institution?

A. Yes, it does.

Q. Now, another point has been raised in regard to the rejection of specific publications, and I'd like to direct your attention to page 3 of that exhibit and ask you to read the first two sentences of subparagraph C.

A. "The warden may not establish an excluded list of publications. This means the warden shall review the individual publication prior to the rejection of that publication."

[903] Q. Was there a period of time in which the Bureau used to exclude a publication simply because of its title?

A. Yes, there was.

Q. And this regulation indicates that policy has been rejected?

A. That's correct.

Q. Would a warden be permitted to reject a publication even if he had rejected five or six previous issues, based on the title alone?

A. No, he would not.

Q. Would he have to review each and every publication as it came into the institution? I say he or someone under his direction.

A. Yes, they would.

Q. Why do you require the review of each publication rather than simply rejecting them by title?

A. I think the content of publications changes. What may be objectionable today may not be tomorrow. There are changes in policies in terms of the publications that a given newsletter or magazine permits.

Q. I would like to direct your attention to page 2 and on page 2 there are a number of criteria under which a warden may exclude a publication. And I direct your attention to number 2. I ask you to read that to yourself.

A. "It depicts, encourages, or describes methods [904] of escape from correctional facilities, or contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions."

Q. Does the ability of a warden to reject a publication—does that further the maintenance of security, good order and discipline in an institution?

A. Yes, it does.

Q. Why is that?

A. I think any time you would permit material to come into an institution that would give ideas or clues or hints as to how to escape could well be used by inmates to do just that, to attempt to escape from the institution.

Q. Is that particular provision too broad or too vague?

A. I do not believe so.

Q. I direct your attention to subparagraph 5. I ask you to read that.

A. "It depicts, describes or encourages activities which may lead to the use of physical violence or group disruptions."

Q. Does that particular provision which permits a warden to exclude a publication that falls in that category further the maintenance of security, good order and discipline in an institution?

A. Yes, it does.

[905] Q. Why is that?

A. One of the things we've tried to do in our correctional institutions is keep them as safe as we possibly can, safe for both staff as well as inmate. And I think anything which would come into an institution that would further the violence that is all too traditional in a prison environment is certainly something which we would attempt to guard against. It's certainly detrimental to the good order and functioning of the institution.

Q. Is it possible that a publication might not lead to the use of violence or disruption —

THE COURT: Might not what?

BY MR. DUTTERER:

Q. —Might not lead to the use of physical violence or group disruption at one institution, but do so at another?

A. Yes, very definitely.

Q. In your professional opinion, does the warden of a particular institution need the discretion to decide whether

it would or would not affect his institution at any given time?

A. Yes, he does.

Q. Would part of his discretion include consideration of some of the gang problems you spoke of?

A. Yes, it would.

Q. Let me direct your attention to number 6. I ask [906] you to read that one.

A. "It encourages or instructs in the commission of criminal activity."

Q. Do you think that is vague and too overbroad?

A. I don't think so. I think it's very clear and explicit.

Q. Let me direct your attention to number 7 and ask you to read that one.

A. "It is sexually explicit material, which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity."

Q. Now, under that particular provision and continuing over to page 3, there's a number of paragraphs in bold type. Do you understand that to be implementing information?

A. Yes, I do.

Q. What does that mean?

A. That is the guidelines given to the warden and staff of the institution as to how to actually implement or interpret the policy that's been established.

Q. Is that provided for the purposes of attempting to insure some uniformity in decision-making?

A. Insofar as possible, yes.

Q. Again, is it possible at one institution a warden might exclude a publication which falls under number 7, [907] but that same publication falling under number 7 would not be excluded at another institution?

A. Yes, it is.

Q. Why is that?

A. The differences in the institutions, the differences in the types of inmates confined there, and the different climate of the institution. If a given institution has a particular problem at one time, the warden would have a different basis on which to make a decision than would another warden given a different set of circumstances.

Q. You mentioned that homosexuality is a problem — indeed, maybe the number one problem in the correctional systems. Is it possible that a warden at one institution with a problem involving homosexuality might reject a lot of homosexual publications and another warden would not?

A. Yes, he would.

THE COURT: On that particular point, from what I've heard up to now, homosexual relationships to some extent are part of the prison lifestyle. And it probably exists to a greater extent here than it does here or it does here or some place else. I'm interested in why you say that a warden, having in mind the fact that he has some homosexual problems, might exclude a magazine that rather explicitly suggests homosexual conduct and a warden some place else wouldn't do it. I mean, I don't quite understand that. [908] THE WITNESS: Well, your honor, in a level-one institution, for example, such as Allenwood, Pennsylvania, given the type of inmates we can find there, I'm certain the warden is not nearly as concerned about homosexual activity as the warden would be at Lewisburg, or at Leavenworth or at Marion.

First of all, the classification system we utilize tends to screen out fairly well the aggressive assaultive inmate from the more passive inmate, who is not going to present a problem in terms of violence.

In addition, inmates at Allenwood have much more frequent access to furloughs, the ability to go home and visit their families and to have their wives visit them than would

the inmates in another institution. So that institutions do vary by types of inmates that are confined there.

Also, problems arise at one particular time in an institution, a particular problem, for example, which may not be present in another institution.

Institutions are a dynamic phenomena. They do change very frequently. The composition of the inmates changes, and the types of problems that the inmates present change.

THE COURT: In the same institution?

THE WITNESS: In the same institution. That's [909] correct, sir.

BY MR. DUTTERER:

Q. Do you understand that the Bureau of Prisons has a policy whereby if a publication is rejected, it's rejected in its entirety rather than cutting and pasting the publication?

A. That's correct.

Q. Why does the Bureau have that policy?

A. There are several factors. One, of course, is the administrative workload. Our resources in terms of personnel are limited. We simply don't have the manpower to cut and paste the various publications.

Also, I think that most inmates would find the censorship that we saw in the past something that they do not care for. They would far rather see a publication excluded in toto than a piece cut out of the center, which they certainly would raise questions about its contents in that particular issue.

THE DEPUTY CLERK: Government's Exhibit number 11 marked for identification (G-174).

(Whereupon, Defendants' Exhibit number 11 was marked for identification.)

BY MR. DUTTERER:

Q. I show you what has been marked for identification as Defendants' Exhibit number 11. I ask you to de-

scribe [910] that document.

A. In preparation for this trial, we attempted to gain information as to the amount of staff resources that were being expended in this general area of publications coming into our institutions.

A teletype was sent out from my office to all of our wardens asking them to furnish us with estimates of the manpower requirements in their given institution.

Q. Is page one a copy of that teletype?

A. Yes, it is.

Q. And are the four attached pages a summary of the responses prepared by someone in your office?

A. Yes, they are.

Q. I'd like to ask you to read question number one on the teletype.

A. "How much time (in hours per average month) is spent at your institution in checking for contraband and screening content of publications, newspapers, catalogues, etc. by all mailroom personnel?"

Q. I ask you to look at the third page in that exhibit. Does the information contain there the summary of the total hours?

A. Yes, it does.

Q. And how many hours were spent in response to question number one?

[911] A. 2,077 man hours per month.

Q. Is that reduced to man years per year?

A. Yes, twelve-and-a-half man years.

Q. And what is the second question directed to?

A. "How much time (in hours per average month) is spent at your institution by the warden, supervisor of education and anyone other than mailroom personnel involved in the process of screening publications, newspapers, etc. for admission under policy statement 5266.3?"

Q. And what is the summary of the responses?

A. 771.5 man hours per month or five man years.

Q. What is question number three?

A. "How much time (in hours per average month) is spent at your institution by all personnel in opening special mail in the presence of the inmate?"

Q. And what is the summary response?

A. 2,105 man hours per month or approximately 12.6 man years per year.

Q. And, finally, what is inquiry number four?

A. "How much time (in hours per average month) is spent at your institution by all personnel opening and inspecting mail in the mailroom?"

Q. And what is the summary response?

A. 5,014 man hours per month, or approximately thirty man years.

[912] Q. In your opinion, if you were required to cut and paste particular publications, would the amount of man hours presently spent increase?

A. Yes, it would.

Q. I'd like to direct your attention to page 3 of exhibit number — that's Plaintiffs' number 4, the policy statement. There is a question regarding — an issue regarding the due process in the rejection of publications. And I'd ask you to look at subparagraph (D). And does that paragraph describe the procedure that the Bureau follows following rejecting of a publication?

A. Yes, it does.

Q. And I'd ask you to read the third sentence to the conclusion of subparagraph (D).

A. "The warden shall permit the inmate an opportunity to review this material for purposes of filing an appeal under the administrative remedy procedure unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the

security, good order or discipline of the institution, or to encourage or instruct in criminal activity."

Q. Is it the policy of the Bureau in most cases to at least permit the inmate an opportunity to review the publication?

A. Yes, it is.

[913] Q. I direct your attention to paragraph (E). Does that paragraph provide that the warden should retain the publication in his facility in case it is needed for review on appeal?

A. Yes, it does.

Q. Another issue that has been raised is one that's entitled "the excluded list," and did you not testify a few moments ago that there is no excluded list in the Bureau of Prisons?

A. That is correct.

Q. And, indeed, it's prohibited by the program statement?

A. That is correct.

Q. Now, I direct you attention to Plaintiffs' exhibit number 10, the program statement entitled "Correspondence." I direct your attention to page 9, and does subparagraph 9 on page 9 state the Bureau of Prisons' policy regarding correspondence between confined inmates?

A. Yes, it does.

Q. And in summary terms, would you describe that policy?

A. The warden may, if he deems appropriate, allow inmates to correspond if they're in different institutions.

Q. And may inmates correspond if they have relatives or members of the immediate family in another institution?

A. Yes, they may.

[914] Q. May they correspond if they're a party or a witness in a legal action?

A. Yes, they may.

Q. Why don't you simply permit all inmates to correspond without these special provisions?

A. I think to preserve the good order or [sic] our institutions and the systems that we operate, we must restrict inmate-to-inmate correspondence unless there's a legitimate reason for that correspondence to exist.

The federal system does house, as I've indicated, some 800 state inmates. A number of other cases that are in our institutions are there because they're under protection or for protection. And I think that to allow inmate-to-inmate correspondence as a general rule would certainly create additional problems for us in terms of security and the good order of our institutions.

Q. In your professional opinion, does this provision further the maintenance of security, good order and discipline?

A. Yes, it does.

Q. Couldn't an inmate simply use telephones or whisper a message to a visitor in order to get it to another inmate?

A. The possibility obviously exists. There are other means of communication, but I think the mail is certainly one over which we can exert some control. And I think we simply must to preserve the good order of our facilities.

[915] Q. Why don't you simply just read all of the mail that goes from one inmate to another inmate?

A. The manpower that would be required would be very great. In addition, inmates find a variety of different ways in which they can communicate, either through an informal code system or other means and use that as a vehicle to get the message to another institution without coming right out and saying something which the staff might be able to pick up.

Q. You say an informal code. You're not referring to a system of A equals one and B equals 2, are you?

A. No. Code words, nicknames and words that may appear very innocuous on the surface, but may have a very personal and deep meaning within a prison gang, for example.

Q. Is there concern that gang members, who are scattered throughout the system, would use this method to communicate with each other?

A. Yes, there is.

* * * * *

BY MR. DUTTERER:

Q. You were discussing a moment ago some of the reasons that prisoner-to-prisoner correspondence is not generally [916] permitted.

MR. NEY: Your Honor, could I ask that we wait until my clients are here?

THE COURT: Yes.

MR. DUTTERER: Oh, I'm sorry.

* * * * *

BY MR. DUTTERER:

Q. A few moments ago you were discussing some of the concerns about permitting one inmate to correspond with another inmate as though he or she were a member of the public. And you had discussed a concern about communicating in sort of a code or jargon or language that they would understand. And earlier you had discussed gangs in federal [pr]isons. Is there a concern that these gang members will communicate with each other?

A. Yes, there is.

Q. What are some of the activities that the gang members might try to perpetuate or continue by communicating with each other?

A. Obviously they could attempt to further a criminal activity either in the prison or in the community. The most dangerous thing I could think of would be to order the execution or murder of someone who has testified against them or has not cooperated with them.

[917] Q. Does the federal system have in its facilities people who are placed there either from the States or from other federal facilities in sort of protective-custody status?

A. Yes, we have many cases of inmates who are being protected while they're in the Federal Bureau of Prisons.

Q. In general, what are some of the ways that you attempt to do that?

A. We, of course, attempt to transfer them to institutions where their lives will not be in jeopardy. We try to move them away from the scene of the incident.

For example, if the inmate is from the East Coast, he'd be transferred to the West Coast to move him as far geographically as possible and to separate the inmates from people who may have a vendetta against him or her.

Q. Do you believe that the unfettered communication between inmates would compromise this program?

A. Yes, I do.

* * * * *

[926] Q. Let me direct your attention to the next issue. It's referred to as news clippings and correspondence. Does the Bureau have a policy which automatically rejects any news clippings that come with correspondence?

A. No, it does not.

Q. How are news clippings that would come with correspondence treated?

A. On a case-by-case basis. The content of the news clippings would be the determining factor as to whether or not it would be permitted to come into the institution.

CROSS-EXAMINATION

* * * * *

[974] Q. The question is do you feel those two opinions, one warden who would exclude materials of any actual sex act and another supervisor of education, who can allow in any materials like that — doesn't that allow or encourage those kinds of differences that we've been talking about under the Bureau Policy Statement?

A. In part, although obviously the warden is the final decision-maker in the institution. The supervisor of education is merely one of several hundred staff members. Each of our staff or many of our staff do have different opinions. I certainly would encourage different opinions among staff, but the warden is the man ultimately responsible and charged with the security and order of the institution. And I defer to that man's or that person's judgment in [975] these and other matters.

Q. Are you aware that Debra Spidle, the mailroom clerk at Lewisburg, explained that the standard she used in referring items up for further review was as follows: "I have a standard. Sex is a standard. Radical is a standard. I would go out on a limb and say communism and fascism is a standard I would use. It's more of a political sexual type standard I personally use. I have not been told."

MR. DUTTERER: Again, your Honor, I would ask for the date of the deposition that Mr. Ney is reading from. I assume he is reading from a deposition.

MR. NEY: This is from the same period of time in the fall of '77.

THE COURT: '77?

MR. NEY: '77.

THE WITNESS: Again, she is not making the final decision. She is referring the matter for further discussion and deliberation by other staff members who would make the final decision.

We have 10,000 employees in the Federal Prison System. We do have standards. We have guidelines that we have promulgated. And I think the system does work quite effectively to elevate to the warden for the ultimate decision on the rejection or acceptance of publications.

THE COURT: Don't the present rules sort of neutralize [976] that kind of business?

MR. NEY: No, your Honor. It still allows the exact same discretion. It says, "any sexually-explicit material can be kept out if the warden thinks it's detrimental to security."

BY MR. NEY:

Q. Let me call your attention to a magazine called *The Call*. It's marked as Plaintiffs' 15. Do you recall at your deposition being asked to review a page from *The Call* relating to the Marion Control Unit on page 3?

A. Yes, I do recall seeing the publication during the deposition.

Q. And do you recall at that time stating that you would not sustain exclusion of that article, which you read about the Marion Control Unit, from Marion at the present time?

A. In 1981, that's correct.

THE COURT: What's the date on the publication?

THE WITNESS: This is 1977, four years ago, March of '77.

MR. NEY:

Q. Now, are you aware that this paper was excluded from Marion and Atlanta?

A. During 1977 I believe you mentioned that it was. I have to accept that. I don't know for a fact.

Q. Are you also aware that this paper is regularly [977] allowed into Lewisburg?

A. During 1981?

Q. No. At the time in 1977.

A. It may well have been. I don't know for a fact.

Q. All right.

Are you also aware that the warden at Atlanta—the associate warden at Atlanta a year later at his deposition stated that he would exclude this article, or he would exclude it again if it came to him in 1978 because “anytime you talk about insurrection or anything like that, you can guess it’s going to happen.” And he believed that this article would tend to incite inmates into work stoppages, riots, and assaults on staff and inmates.

Does your policy allow that kind of distinction being made between institutions?

A. Yes, if at the time the associate warden or warden in Atlanta felt that the tensions and problems within that institution were such that it could create a disturbance or insurrection, he would have the authority to ban publications. But, again, it’s upon the circumstances at the time as known by the staff member, warden or associate warden who is in charge of that institution.

* * * * *

WASHINGTON, D. C.
WEDNESDAY, MAY 27, 1981

* * * * *

[995]

GARY McCUNE

a witness, called for examination by counsel for the defendant[s], having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

Q. And what is your current occupation?

A. I am Regional Director of the Southeast Region[,] Federal Bureau of Prisons.

* * * * *

[1009] Q. Was homosexuality a problem at [Petersburg Correctional Facility]?

A. Yes, it’s a problem at every institution, I think.

Q. What did you, as a Warden or Chief of Classification, attempt to do in order to cut down on homosexual activity?

A. Well, I don’t think anyone directly was involved particularly in that position. I think it’s an issue we constantly wrestled with on how we could control it and handle it. The biggest concern is the predatory kind of behavior. It’s hard to stop or control consenting behavior except as we can supervise and discipline it when it’s encountered.

* * * * *

[1034] Q. In your 20-some odd years as a prison official, are you able to reach the conclusion that there is considerable, that homosexual activity generates violence?

A. I don’t think there is any question about it. I think it’s probably one of our top two causes of violence in the institution. I would rank homosexual encounters or conflicts and drugs particularly as the top two causes. And debts follow very close behind probably. But homosexuality would be the top or one of the top two.

* * * * *

[1037] THE COURT: [A]s you look back over it, to the amount and the problems generated by the homosexual

publications * * * [a]re they exacerbad [sic] or just about the same or can you say that the existence or presence or absence of these publications makes any difference to you or contributes to your problems or what?

THE WITNESS: Well, I guess we were talking about Playboy, for example. Specifically the homosexual type literature that's clearly homosexual oriented—not necessarily Playboy, which is basically heterosexual—the homosexual magazines do contribute to the problem specifically because of the targeting theory. In other words, as I mentioned earlier, we have the predatory type of inmates constantly on the roam to try to identify weak inmates and homosexuals they can get under their control. There are other ways to find out about this but immediately that targets a guy as homosexual very much like a gay. If I see a person reading a golf magazine, I think I can rightly assume he is interested in golf and likes the game. So I think it has helped to contribute to those who may not necessarily want to be identified and contributes to the problem of homosexual violence in the institution.

* * * * *

CROSS-EXAMINATION

[1041] Q. Do you recall what your opinion was at the deposition about that publication as to whether or not it would be acceptable at any institution within your region at the present time?

A. I don't know. Is there a specific part of the magazine? I just don't recall.

Q. You were directed at the deposition just to look at the pictorial matter. We don't have time for you to review the entire text.

A. I think I indicated that, based upon a couple of issues in here, and one is a depiction of bestiality, that I felt I could support rejection at any institution if the Warden rejected it.

I don't know if this is the same magazine on sadomasochism. I can't find it right now. Yes, it's right here.

Q. Is that the article on Dracula?

A. Yes.

Q. On the basis of the page 18 on bestiality and [1042] the Dracula section you would affirm exclusion from every institution in your region?

A. If the Warden made the decision. I of course don't get involved unless he does exclude it and it's appealed. But I think I said in line with our policy, if it were excluded, I would support it.

Q. Now, are you aware, Mr. McCune, that issue of Hustler and other Hustlers have been sold in the commissaries at other Bureau of Prisons' institutions?

A. I think you told me. It may be. But I think that's a local decision based upon the circumstances at the institution.

Q. Is it your opinion that it is wrong to sell that issue of Hustler at the other institutions?

A. No, it's not my opinion that it's wrong. I think it has to be done based on the circumstances at the institution by the Warden on the scene and by the reviewing person, if it's appealed.

Q. Let me read you some sections of your deposition, page 54 and 55, which was taken on April 23, in Atlanta of this year.

"Q. Are you aware that other institutions within the Bureau, Level Five and even Level[1043] Six, sell Hustler Magazine in the commissary?

A. In this region?

Q. No, in other regions.

A. That may be, but I would question it. But I would not have to worry about that. In this region

they do not unless somebody violated my orders. We do not have to be concerned about rights in the commissary. You do not have to sell anything you did not want to

Q. Would that change your opinion about the likely effects that you are predicting?

A. No. That would tell me that somebody made a bad decision."

A. But you are talking about selling in the commissary, not prohibiting access to the publications. That's two different things. The institutions determine what's sold in the commissary. And I have had a number of meetings with the Wardens and made a determination with them we would not sell this particular magazine in the commissary. But that does not mean they cannot get it through subscription.

Q. I thought you just testified you would affirm—?

THE COURT: (Interposing) * * * [1044] Put your question and give him a chance to answer. * * *

THE WITNESS: I said this particular issue, because of the two items in here, that I felt I could support rejection if the Warden rejected it at the institution. I did not say Hustler Magazine per se in general I would reject. I would look at it on an issue-by-issue basis. I did say the Wardens agreed we do not sell Hustler in the commissary. But there may be other magazines we may not sell in the commissary. It doesn't mean the inmate cannot subscribe to it and get access.

BY MR. NEY:

Q. He could not get access if it was turned back at the front gate, would it?

A. That's right. If it's turned down on some particular content. It doesn't mean he cannot get other issues of that same publication.

Q. Let me see if I can understand your testimony. You would evaluate based upon the climate and the feeling of the Warden at his particular institution; is that right?

A. He makes the judgments about the climate and the tone of the institution. I am familiar with those in my region and I would use that to pass judgment on his decision, [1045] also taking into consideration the nature of the item.

Q. And you would also take into account the security level at the institution?

A. That's true, yes.

Q. But in this case, with regard to this issue of Hustler Magazine, you would affirm exclusion from every institution from the camp at Eglin Air Force Base to the Atlanta Penitentiary?

A. If the superintendent felt it would in some way affect the security or order at the institution, then consistent with our policy, I feel I could uphold that particular position on this particular issue.

Q. I'm going to show you what's been marked as Plaintiff's 54 and 55. Fifty-four is Playgirl. Fifty-five is Playgirl Calendar for 1978. Do you recall being shown Playgirl Magazine at your deposition?

A. Yes, sir.

Q. Do you recall that your testimony was that you would exclude Playgirl Magazine from every institution in your region? Do you recall that in your testimony?

A. During the deposition you were constantly putting me as being the Warden. In what context are you asking me the question? As Regional Director, yes, I would affirm.[1046] If the Warden decided to exclude it, I could uphold that exclusion.

Q. And if you were the Warden you would exclude it from every institution in this region?

A. Using the same rationale that I would use to uphold it. I think Playgirl Magazine, at a male institution, would only appeal to a homosexual and it gets back to the targeting issue.

Q. And are you aware that this magazine is acceptable at Lewisburg, which is a major maximum security penitentiary?

A. I am not aware of it.

Q. Would that change your opinion?

A. No, it would not.

Q. So as you understand the policy of the Bureau of Prisons, it allows exclusion of Playgirl at every institution within your region, from One to Six, but at the same time it could be available at Lewisburg?

A. Policy doesn't exclude any particular item.

* * * * *

[1051] Q. I show you Plaintiff's 80. Does that indicate that the January, '79 issue of Hustler was rejected from Atlanta?

A. Yes.

Q. And Plaintiff's 81, does that indicate that the magazine entitled The Best of Hustler was rejected on January 21, 1980 on the grounds that lesbianism is considered a danger to the security, good order and discipline?

A. Yes.

Q. Is it your testimony now that those issues of Hustler were improperly excluded from the institutions listed in those exhibits?

A. I don't have any way of telling that in terms of the rationale as to why it was made. I have not seen the articles. And the policy has changed.

Q. Is lesbianism a basis for excluding a publication in a male institution at the present time?

THE COURT: Apparently it is. It was, wasn't it?

MR. NEY: He said it changed.

[1052] THE WITNESS: I think it would be unlikely to be restricted just on that. In fact, I think a number of these that were restricted may very well be accepted now. But there's no way to tell from this information.

* * *

[1057] Q. What is your position today, having read the article which was critical of the Bureau of Prisons' medical [1058] system, with respect to the institutions in your region today?

A. Today I wouldn't be concerned about it. I am not rejecting, even at that point, just based on a criticism of the Bureau of Prisons. But it accused the Bureau of Prisons of murdering certain inmates, which is not true, and I think might further inflame a concern on the part of other prisoners. It's more diluted at this point the further removed from the actual situation, and it would have less impact at this point. If a Warden gave me a specific reason wanting to reject it and gave me some rationale, I would certainly have to consider that, even at this date. But I don't exclude things and Wardens don't normally either. I would not support it just because they differ with the Bureau of Prisons or challenge the Bureau of Prisons.

* * * * *

[1067]

JAMES HENDERSON

called for examination by counsel for the defendant, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

Q. What is your current employment?

A. I am Regional Director of the North Central Region of the Bureau of Prisons, Kansas City, Missouri.

* * *

[1073] Q. Does homosexual activity tend to generate violence, in your experience?

A. I would say, as Mr. McCune mentioned earlier, that homosexuality has been one of the prime causes of violence in prisons. Not too many years ago, I was the head of the Board of Inquiry at Lewisburg because of the number of murders. And I recall, the reason for the investigation was there were eight murders and five of those had homosexual acts or homosexual pressure.

Q. Did you serve on the Board of Inquiry?

A. Yes, I chaired it.

Q. Could you please explain how the Board of Inquiry got appointed? What precipitated this?

A. There was a lot of community and judicial interest in some of the problems at Lewisburg that were communicated to the Director of the Bureau of Prisons. And the Director appointed the Board of Inquiry to look into the causes and the overall operations at the penitentiary at Lewisburg.

Q. And five of these eight homicides were—I'm not sure I quite got what you said.

A. Were directly related to some form of homosexual activity. Either someone was being pressured that didn't like [1074] it and struck out at the predator or else the predator killed the victim.

Q. Was this surprising to Bureau officials?

A. It seemed like there was a heavier concentration at that institution. And that was the reason for the special Board of Inquiry, which a Board of Inquiry being appointed for disruptions or some management problems is not unusual. The Director has, we have a policy for that.

But it came in a very short time span, and Mr. Carlson felt that we needed a review of that institution.

Q. What is it that, in your view, what is it in publications, that involve explicit homosexual activity or bestiality or children's porn that can be labeled a detriment to the security or good order of [sic] discipline of an institution?

A. We have a closed society. And many are there for violent acts. And I think this can arouse emotions of those confined. Many, as has been mentioned earlier, are not the most stable people in the world.

Q. Publications in some way encourage activity?

A. Right. And also it identifies the person that is interested in either homosexual activity or bestiality or makes him a target for others to attack.

Q. If homosexual publications are allowed into an [1075] institution, in your opinion, is there an air of legitimacy attached to homosexual activity?

A. I think management of an institution sets the tone and the climate. And to do that, it must communicate to the staff and to the inmates what their expectations and what their standards are. And I believe to permit it in would be a message to both that it was condoned.

Q. When you talk about targetting, are you talking about someone's reading a publication targetting him for an assault, necessarily?

A. It certainly is one possibility, yes.

Q. Does it target him for consensual [sic] activities as well?

A. It would make it known what his interests were. Not every homosexual has special mannerisms; some are very undecided about which lifestyle they will choose. And then there are some that just definitely aren't interested. Some homosexuals are selective; some are not selective. So this would identify anyone reading that would identify that group.

* * * * *

[1112] Q. Would it be much of a burden for the prison officials to have to [delete objectionable material from publications rather than reject the entire publication]?

A. You have heard a lot of man years are expended in the mailroom. I think it would delay. It's practically [sic] impossible.

* * * * *

CROSS-EXAMINATION

[1136] Q. And you are again aware that these have been coming into the institutions in the North Central Region?

A. Yes.

Q. And to your knowledge, have those caused any problems, have any problems been called to your attention?

A. Not called directly to my attention, no.

[1150Q] Q. Have you had a chance to review the article that first I wanted you to read the reasons for rejecting this publication?

A. I have read that letter.

Q. Could you just read into the record what was the reason for rejecting the publication from Leavenworth?

A. "The May 15, 1981 issue of Win Magazine has been rejected by U.S. Penitentiary, Leavenworth, Kansas. On pages 19, 20, 21 and 22 and 23 of this issue depicts, describes or encourages activities which may lead to use of physical violence or group disruption."

Q. And have you had a chance to look at those [1150R] pages in the magazine?

A. No, I have not.

Q. Just on the face of the rejection letter, does that meet the standards set out in the Bureau of Prisons'

policy? Because look at the rejection letter. It states the page number — .

A. (Interposing) It says "disruptive to the good order of the institution."

Q. So is that enough?

A. I don't know what is in these pages which might be more specific. The inmate has a chance to review this material also if he is going to appeal it.

Q. Just looking at the rejection letter on its face, does that meet the requirement in the policy statement?

THE COURT: Exhibit 99?

MR. NEY: That right.

BY MR. NEY:

Q. Is it specific enough to meet the requirements of the policy statement?

A. It should spell out more specifically the purpose of the rejection.

Q. It should be more specific than it is?

A. Yes, sir.

[1150S] MR. NEY: Your Honor, I would like to have the witness to have an opportunity to look at the few pages that were the subject of the rejection and have him give his opinion as to in what way those pages about Federal Bureau of Prisons are detrimental to security. I think I know it may take a few minutes, but I think it may be worthwhile in the interest of understanding what the thought processes are that are going on here, because we are challenging the constitutionality of these decisions.

THE COURT: Do you have Exhibit 99 in front of you?

THE WITNESS: Ninety-nine, yes.

THE COURT: Do you have Exhibit 100 in front of you?

THE WITNESS: Yes, sir.

THE COURT: Okay, go ahead.

(Witness examining document)

BY MR. NEY:

Q. Have you had a chance to review that?

A. Yes.

Q. And would you today affirm or reject or reverse the Warden at Leavenworth?

A. This is the first I have seen it, and it's a [1150T] hurried review, but based upon the information I have without having talked to the Warden, which I have not done with this, but I would probably let it into the institution.

Q. And is that because it does not encourage or lead to group disruption or violence?

A. It's a critical article of Federal prison industries. But we get criticized, so that in itself, I would probably let it in.

* * * * *

WASHINGTON, D. C.
THURSDAY, MAY 28, 1981

* * * * *

[1153] DR. PETER L. NACCI

was called as a witness by the Defendants and, having been first duly sworn, was examined and testified as follows:

[1154] DIRECT EXAMINATION

* * * * *

Q. What is your current employment?

A. I am the Director of the Staff Training Center at Atlanta, Georgia.

* * * * *

[1169] Q. So, that there is some reason to believe that pornography could lead to violence in prisons?

A. I would say yes, and I would say indirectly, perhaps, through arousal or increased sexual activity. These people are reading this material for some reason, and I think primarily to get aroused.

Q. So, there's sort of an indirect correlation between the pornography and the violence?

A. Let's put it this way: If the material is stimulating sexual behavior, and if there's a connection between sexual behavior in prisons and violence, which I think there's no question about, then, yes indirectly I [1170] would expect that pornography, either heterosexual or homosexual, could lead to increased aggression in prisons.

And I think I made the point that there is evidence that homosexuality is tied to violence in prisons, and I'm referring specifically to Hans Toch's work in the California prison system.

As a Chairman of a major task force in 1968, Toch reported that 25 percent of all assaults that were occurring in that prison system were motivated by homosexual activity. A recent publication called "Prison Homicide," by Sylvester from Bates College, indicates that homosexual activity is either the first or second most frequent motive for homicides in all American prisons in a calendar year, and I think that's pretty compelling evidence.

* * * * *

[1205] Q. We heard that not much homosexual material gets into prisons. If that's the case, and if more homosexual literature were to get into the prisons—

THE COURT: You said you heard not—

MR. JAMESON: Not much homosexual literature—not much homosexual material gets into the federal prisons, and if more material than is now getting in

were to get in, is there any opinion that you would have with respect to how these questions and answers might—how the answers of these [1206] questions might differ?

THE WITNESS: Yes. I think particularly on these questions, they would be higher.

In other words, not having the material visibly displayed and not having it easily accessible, would tend to repress the results—would tend to suppress the results, I'm sorry.

BY MR. JAMESON:

Q. In your view, it is reasonable to assume that the increase of explicit homosexual material into the federal prisons would increase the perceptions of legitimization and targeting?

A. That would be logical.

* * * * *

[1216] JACK G. YOUNG,

was called as a witness by the Defendants and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

Q. What is your present occupation

[1217] A. Commissioner of Corrections, State of Minnesota.

* * * * *

[1223] Q. Do you give the warden and superintendent a great deal of discretion in running their institutions?

A. Yes, sir.

Q. Why?

A. I suppose as an ex-warden I feel very strongly that there has to be a substantial amount, a substantial freedom to act delegated to institution superintendents.

There is, even in our own small system, there's a great difference in the institutions, between institutions. I think each institution has its own uniqueness, its own characteristics, and I think those have to be taken into account when departmental policies are formulated.

* * * * *

[1233] Q. I would like to direct your attention particularly to sexually explicit homosexual material.

Why do you believe it would further the maintenance of good order, security and discipline to reject that type of information?

A. I think in terms of the homosexual material, it's a difficult issue, but homosexuality is a problem in any one sex society, as a prison is and it's accentuated much more in a prison than in the military or a college, and I think each institution has a mission and a purpose, and I think that common sense dictates that to saturate, to saturate an institution with sexually explicit, homosexual type publications would not be in the best interests of the institution or the order of the institution, the security of the institution.

I can't help but feel in my professional judgment, and I don't have studies that I have personally done, but I can't see how that would not tend to increase, in terms of stimulation, in terms of arousal, in terms of some of the problems that you have in prisons—I think it would tend to increase the problem rather than decrease it.

* * * * *

[22] **CLAIR A. CRIPE**

was called as a witness on behalf of the government, and, having been first duly sworn, was examined by counsel and testified as [23] follows:

DIRECT EXAMINATION

* * * * *

Q. What is your current occupation?

A. I am an attorney in the Federal Bureau of Prisons.

Q. What is your title?

A. General Counsel.

* * * * *

[38] A. This survey shows that for that seventeen month period [from November 1979 through March 1981] there were ninety-six complaints filed by inmates for any type of reason—any kind of complaint dealing with publications.

At the local or Warden level as a basis of those complaints, eighteen wardens granted relief and turned the decision around.

Sixty-three affirmed their original decision.

Of those sixty-three, forty-three of the sixty-three appealed to the Region on a BP10.

At the regional level six turned around the warden's decision and thirty-six affirmed the warden's decision.

Of the thirty-six, twenty-one appealed to my office—of the twenty-one appeals during that period of time, which pursued the process, all the way to the end, eight were granted and eleven were denied

Q. Did you calculate the percentage that were turned around?

A. Yes, we did. The percentage both as the percentage [39] of turn-arounds, of reversals at each level, as well as the total percent of relief granted or reversals.

Q. And what is the total percent of relief granted?

A. Out of the total ninety-six that were initially filed—exactly one-third, or thirty-three percent, were turned around through this review procedure.

Q. So, during a seventeen month period, there were only ninety-six appeals filed regarding rejection of publication[s]?

A. That's correct.

Q. Does this include all forty-three institutions?

A. Yes.

Q. All of approximately twenty-five thousand inmates, is that correct?

A. It includes many more thousands than that—it includes twenty-five thousand inmates at any one time. Yes.

Q. So it would be more than that because some are coming and going through the system?

A. That's correct.

Q. And it is your testimony that a survey of your materials indicates approximately five or six appeals a month in the last year and a half—approximately—year and a half?

A. It would come out to about, between five and six, yes.

* * * * *

EXCERPTS OF DEPOSITION TESTIMONY

DEPOSITION OF NORMAN A. CARLSON
WASHINGTON, D.C.
TUESDAY, APRIL 21, 1981

EXAMINATION BY PLAINTIFFS

* * * * *

[72] Q. Well, were there any security threats presented by excluding the parts that were objectionable and allowing the inmate to have the part that is okay?

A. Well, one obvious one is the amount of manpower that that required, to sit down and literally excise the parts that were considered objectionable.

Q. Aside from the manpower that was needed is there anything else that was of a security concern by excising those portions and giving the inmate the remainder?

A. I can't think of any offhand.

* * * * *

[86] Q. Let me ask it in a different way. Reading the article on page three about the Marion Control Unit, does that article, if it came into Marion today would that be a security threat, in your opinion?

A. Not today, because this entire matter, that entire [87] case has been litigated since 1977.

Q. And if it came into any other Federal prison at the present time would that present a security threat?

A. Again, probably not, again, for the same reason; because the entire matter has been fully litigated.

* * * * *

[90] Q. I would like to show you a copy of "Join Hands" for October/November, 1976. You can look at the larger copy; it might be easier to read.

I would like to have that marked as Carlson Exhibit No. 12.

(Whereupon, Plaintiff's Exhibit No. 12, Carlson Deposition, was marked for identification.)

BY MR. NEY:

Q. I would like to call your attention to the first two pages, the editorial and then the article about Gay Demos, and ask you if you think those would constitute a threat to security?

A. Well, again, the publication you are handing me was in 1976. The policy has recently been not applied, as I [91] indicated previously in my testimony. I would assume today that most wardens would permit this publication into their institutions.

Q. And do you preceive [sic] this publication, from your cursory review, as not being a threat to the security of the institution?

A. Surely not as much of a threat as some of the other homosexual publications that I have had a chance to read.

Q. Would you please look at the poem on page four, entitled "Ode to Hogpens & Their Keepers"? Do you see that as constituting a threat to security at any of the Bureau's prisons or institutions at the present time?

A. I haven't had a chance to read the entire poem; it is rather lengthy, but obviously, it casts the staff in a very derogatory sense. It certainly doesn't enhance our ability to interrelate, for staff to relate to inmates.

Again, as I said earlier, I think that given the standards of 1981 and our new policy, most institutions would probably permit this in.

* * * * *

DEPOSITION OF CLAIR A. CRIPE
WASHINGTON, D.C.
NOVEMBER 21, 1978

EXAMINATION BY PLAINTIFFS

* * * * *

[II-14] MR. NEY: Let the record reflect that the parties have agreed that there have been approximately 15 administrative remedies filed at the General Counsel level within the past year, since November of '77.

MR. KIRSCHBAUM: Yes.

THE WITNESS: Dealing with?

MR. NEY: Dealing with publications.

BY MR. NEY:

Q. Can you recall within the past year on how many occasions you yourself made an inquiry at the regional or local institutional level with respect to local conditions relating to the rejection of a publication?

A. I don't recall.

Q. You don't recall making any?

A. No. I don't recall how many. I thought that was the question.

[II-15] Q. That's right.

Do you recall making an inquiry on at least one occasion?

A. Yes.

Q. Do you recall making an inquiry on more than one occasion?

A. Yes.

Q. Do you recall who you contacted?

A. I recall two times who I contacted.

Q. And who was that?

A. One time was the Northeast Regional Office, and another time was the -- well, in that same case I also talked to the warden at Petersburg, and another time it was the Executive Assistant at Marion.

Q. Did you say the Executive Assistant?

A. Yes.

Q. That's at the local institution?

A. At Marion.

Q. Do you recall what publications those two contacts were in reference to?

A. Not for sure. I haven't been through these (indicating). That might bring it back. I believe the one at Philadelphia, the Northeast Regional Office, was a [II-16] publication called "Erotic Bookplates."

Q. Erotic?

A. "Erotic Bookplates."

Q. And what about the one at Marion, do you recall what that was in connection with?

A. I believe that was a union publication, but I don't remember the name of it right now.

* * * * *

[II-86] Q. Let me show you Cripe Exhibit No. 14 and ask if this is your approval of the rejection of the March 30, 1977, issue of *The Guardian*?

A. The top page is an indication of the BP-11, the appeal decision in my office, yes.

Q. And you rejected it for the reasons stated in the letter, which is on the first page of Cripe 14?

A. Yes.

Q. Which appears right above your signature?

A. Yes.

Q. Could you review the publication which has been marked as No. 15 and indicate what portion or portions of this magazine formed the basis for your decision?

A. (Perusing.)

Q. Can you answer the question?

[II-87] A. I don't see anything in Exhibit 15 that would be an article promoting the formation of prisoner unions and I would conclude on the basis of that that our decision was based on false information that was given to us as to that being in this issue. The supporting document on this indicates that we were given that information from the institution as to the content of this publication.

Q. Do you agree that the publication also does not promote an adversary attitude among inmates toward staff?

A. I don't perceive that it does, no.

Q. It does not promote an adversary attitude?

A. In my perception, it does not.

* * * * *

[II-99] Q. Could you explain the basis for your decision of September 23, 1977, for confirming the rejection of *Workers World*, and I'm now referring to the specific issue, Cripe No. 19, the issue for April 15, 1977?

A. The basis for the support of the decision was that staff reported to me and wrote up the response as the publication supported gay rights and rebelling and boycotting by inmates, and those matters taken in combination would have been at that time a grounds for supporting rejection of the publication.

Q. Are those valid grounds for rejecting that publication today?

A. You're asking me now if this publication came in today on a rejection by Marion, would it be rejected today?

Q. That's right.

A. I doubt it very much. I don't think, even after talking to the staff at the institution that there would be a basis for supporting a rejection.

[II-100] Q. Let me now call your attention to Cripe No. 21, which is the issue for April 1st of the *Workers World*, and ask you to review it under the incoming publications standard as it would come to you through the administrative remedy process and to indicate whether or not that publication would be acceptable at Marion today?

A. (Perusing.) I doubt that I would support an exclusion of this publication, No. 21, today, but there are several articles about political prisoners and in support of prisoner demonstrations and uprising, and I think on the basis of those, I would want to talk to the warden about that issue if it came to me for review now.

Q. Assume that it came to you for review as it is contained in Cripe No. 20 with the same language, except that it contained a specific reference to page 11, which I take it is the page you were just referring to?

A. Yes.

Q. Would you affirm a rejection based on the same language in Cripe No. 20 with a specific reference to page 11?

A. No, not with the same language that's in Cripe No. 20.

Q. And why not?

A. Because I don't feel that it has anything to do with [II-101] gay rights or with boycotting.

Q. Are you also saying that your decision at the time it was made in September '77 was in error because there was nothing in this particular issue of *Workers World*, Cripe 21, relating to gay rights and boycotting by inmates that was detrimental to good order, security or discipline at Marion?

A. As to this issue, that's correct, that language would not have been applicable. I'm not saying that it was an error as to all issues, because I haven't at this point seen all issues and I don't know if there's anything that would fall

under—I think there is material in Cripe 21 that would support a conclusion of rebellion and prisoner resistance. Now, I wouldn't use the word "boycotting" to typify that if I looked at that article.

Q. Let me ask you to look at Cripe 22 and ask you the same question, would this issue be rejected from Marion today under the Bureau standards?

A. Well, I have no idea. My answer here would be the same as it should have been on the other one. I have no idea if it would be rejected at Marion today because there's a different warden at Marion today. As we discussed last time, even though the institution may be very similar, the institution at Marion is not identical today to what it was [II-102] a year or a year and a half ago, and certainly wardens are not identical. So, times have changed and I wouldn't want to conclude whether this publication, No. 22, would be permitted in Marion today or not.

But if the question is, if it were rejected today by the warden, would I affirm that rejection—is that the question?

Q. That's right.

A. My answer would be similar to that to No. 21. There are some individual articles in here. I don't see any that come under the category of promoting gay rights or activities, but as to prison problems, there seems to be, again, on page 11, a full page collection of articles on racist and oppressive treatment of downtrodden prisoners in different places around the country, primarily New York, and there also is a specific, I guess editorial response on the editorial page, page 8, to the Marion action, but as with the last one, while it doesn't immediately convince me that those would pose that kind of a threat, I would want to talk to the warden about it and I would concede that he might be able to convince me that it would pose that kind of a threat. My present opinion would be that I would

doubt that this publication, No. 22, if it were mailed to Marion today, I [II-103] doubt that it would be kept out, but that's speculative.

Q. Would you keep it out today if the warden's response was the same as in Cripe No. 20, and contained a reference to the article that you referred to on page 11 and to the note on the editorial page about the exclusion of *Workers World* from Marion?

A. If the warden concluded that because of the conditions at Marion that that would pose a threat to the good order of that institution, yes, I would. My response would not be in the same language as it was back in 1977, but I would support the rejection of the publication.

Q. What in your opinion on page 11 of Cripe 22 is detrimental to good order, security or discipline at Marion at the present time?

A. Well, every one of the articles contains emotional language about law enforcement or criminal justice officials taking unsupportable or illegitimate or oppressive actions against individuals, and I think the accumulation of one after another of these could be perceived and supportive of a prisoner view that all prisoners have the same kind of complaint. It is not conducive to good administration of a prison for all prisoners to be bombarded and people trying to convince them that no matter what their crimes that they are [II-104] illegally confined. That is not a very specific or orderly way to run an institution.

* * * * *

[II-117] Q. Well, can you tell me whether it falls afoul of the standard used in the incoming publications statement at any institution within the Bureau of Prisons, in your opinion?

A. I don't see any article in it that meets the current [II-118] test. If it were rejected today, I would expect to

get an indication from the warden as to the article on which the rejection was based. I don't see that in my review of it now.

* * * * *

[II-121] Q. I would ask you to review Cripe Exhibit 26, which is a 1979 Peace Calendar published by the War Resisters League.

A. (Perusing.)

Q. Do you have an opinion as to whether applying the standard of incoming publications you would reject this, in your own opinion and with your own knowledge of the various institutions from any institution within the Bureau?

MS. WARD: The objection is noted.

THE WITNESS: There is a lot of material in here [II-122] and a lot of it dealing with prisoners. Just leafing through it, a lot of it, if not most of it, now that I look at it, deals with oppression of prisoners.

So, to answer your question, I couldn't give you an opinion quickly as to whether it would be kept out of any institution.

* * * * *

DEPOSITION OF CHARLES FENTON
LEWISBURG, PENNSYLVANIA
DECEMBER 14, 1977

EXAMINATION BY PLAINTIFFS

* * * * *

[108] Q. Would you exclude a publication because it contains an article which describes the health problems of prisoners?

A. I can't imagine, frankly, ever knowing about it. We don't read the articles. I'm not interested in the articles, and the mailroom isn't. They don't have time to read articles, and I don't either.

Q. If they don't read them, how do you know whether or not the publication is objectionable?

A. Well, I suppose maybe a headline catches the eye, or it's an illustration. I really don't know how — as a matter of fact, I suspect they let a whole lot of stuff in that if they did read carefully, we might have some objection to.

Q. Would you allow in *The McKay Commission*, which is the report on the Attica uprising?

[109] A. I think it is in. It's in the form of a pocket-book, and I believe we distributed it at one time or another.

Q. Would you allow in the book *Time to Die* by Tom Wicker, which is about prison problems?

A. As long as I don't have to read it, I don't care who else does.

Q. Are there any books at all that are not allowed in Lewisburg?

A. Not that I know of personally, no.

Q. So the only things that are excluded in the publications area — I'm including books as publications — are

specific publications.

A. Well, you run into a different problem. I can conceive of the idea of a book being objectionable and being rejected. Now, I don't recall that it's happened. I haven't done it since I've been here. I'm not ruling out the possibility that it could happen.

On the other hand, I'm not about to set up a detective mechanism to make sure that every book that comes in here passes some kind of litmus test. If we get a book in here that causes problems, I suspect it will be in here and cause the problem before we know about it. At that point we will have to do whatever is necessary.

[110] And I'm not going to have the mailroom reading books coming in here to see whether or not there is something in there. I mean, that's a pretty monumental task.

Q. But you do read the magazines and publications, you do review those for content?

A. They must review something. If they find something occasionally that — have you ever gone into a post office and watched the people sort mail?

Q. Yes, I've seen that.

A. Did you ever see them sitting around reading *Life* magazine? They never read the *Wall Street Journal*.

Now, I don't really intend that as a commentary on our mailroom workers, but the fact of the matter is that the things that look interesting tend to be looked at as opposed to things that don't look interesting. So I would suspect that most of the things we reject might appear to be interesting.

Q. Is that why some of the things that are prohibited are the sexually-oriented materials?

A. Well, you define your interests, and they will define theirs.

Q. Following what you said, most of the items that seem to be on your excluded list are the sexually-[111]

oriented materials.

A. I really haven't kept a list or an orientation as to what the topics are; but if you say that, I guess it's right.

* * * * *

DEPOSITION OF JACK A. HANBERRY
ATLANTA, GEORGIA
MARCH 16, 1978

EXAMINATION BY PLAINTIFFS

* * * * *

[61] Q. Have you received any guidelines from the Bureau of Prisons as to what types of materials would be detrimental to the good order, security or discipline in a publication?

A. Nothing other than what you have. In showing me in the exhibits as a general guideline, no.

Q. Do you provide any guidance to any of the officials who are responsible for making these reviews as to what they should be looking for?

A. I don't personally provide them with that.

Q. Does anyone?

A. There are always training sessions by Associate Wardens and department heads regarding this kind of thing, and it is my understanding that sometimes they would discuss items such as this.

Q. Do you have any kind of rule relating to what percentage or portion of a magazine must be objectionable before you would exclude?

A. We would identify the objectionable section such as an article. The entire publication may not be objectionable but we don't assume the prerogative of deleting one or taking it out or tearing it out, defacing or otherwise. And so if there's an article in a publication which is objectionable, we conclude that the entire publication is.

Q. Do you have a rule of thumb or any standard as to [62] how much of it has to be objectionable before —

A. Any portion of it.

Q. Have you ever considered deleting the offending portion?

A. No, I have not.

* * * * *

DEPOSITION OF JAMES D. HENDERSON
KANSAS CITY, MISSOURI
MAY 3, 1979

EXAMINATION BY PLAINTIFFS

* * * * *

[24] BY MR. NEY: In what percentage of the cases where you got a rejection of a publication do you contact a Warden to find out what his situation is in that institution?

MR. KIRSHBAUM: Does he personally contact the Warden—

MR. NEY: Yes, right.

MR. KIRSHBAUM: Or, does the Supervisor of Education?

BY MR. NEY: Do you personally contact the Warden?

A. It would be very rare.

* * * * *

[41] Q. I am going to ask you to review an issue of *Guardian Magazine*, dated March 30th, 1977, Henderson Exhibit Number 38. And, I will also give you Henderson Exhibit Number 37, which is a BP-9, 10, and 11, regarding the rejection of that same issue of the *Guardian Magazine*. The inmate's name is James Parker, Number—rather, the Docket Number, apparently, of this item is 3994. And, I would like you to review those materials and tell me whether or not, applying the standard for incoming publications, you would allow this publication into Marion today.

* * * * *

[43] A. This is one that is talking about the prison union, and it advocated prison unions, according to Mr. Cripe, C-r-i-p-e. Like he said, this is two years old, and we are talking about right now. But, prison unions would still not be permitted in if it continued to advocate prison unions.

BY MR. NEY: And, did you find that this publication advocated prison unions?

A. The history of this. But, it does have a couple of union articles to "Don't Mourn, Organize," is one of the articles.

Q. Let me just identify for the record that you were referring to an article on Page 2 in the right-hand column, "Don't Mourn, Organize." And, on the basis of that article, it would be sufficient, then, to reject the publication?

A. Right, on union organization; encouraging union organization. That was a quick review in just a few moments.

Q. Well, let the record reflect that you reviewed it for about ten minutes.

MR. DUTTERER: Objection. It was not ten [44] minutes. I'll stipulate that he reviewed it for five minutes, but we should also indicate that it's, what, 18 by 30 inches, closely typed material, 24 pages long, very few photographs. Obviously the witness has not read every word of every page.

BY MR. NEY: I just want to understand that on the basis of this article—

A. I said it was a very quick review, and that when I saw the headline to organize—I didn't go into detail. If you want me to keep it all day, I will.

Q. Well, I am trying to find out—you said a moment ago that on the basis of that—and, I understand that you haven't spent a long time reviewing it—

A. Right.

Q. But, that you would reject that for Marion today on the basis of this file?

A. I'm basing it on several factors; this, and what has been said by Mr. Cripe.

Q. You also sustained that rejection in the BP-10 process, is that right?

A. Well, I think you need to look at our response. At that time we did not have a copy, and we asked an inmate to send us a copy of this publication, and we would be glad to review it if he did that.

* * * * *

[70] BY MR. NEY: I would ask you to review the *Militant*, Number 28, and tell me whether there's anything in that publication which would warrant rejection today, applying the standard?

* * * * *

[72] BY MR. NEY: Could I have your opinion?

A. Is that what you are asking me?

Q. Yes. Based on your review of the publication, pursuant to the Bureau's standard, would this be accepted or rejected at any time in the North Central Regional institutions today?

A. And, along with my intimate knowledge of what is going on in the institutions in the North Central Region, yes, sir, it would be approved again.

Q. Thus, you feel that this publication does not glorify problem inmates, is that right?

A. I did not make that in-depth study of it. I'm saying that, based on the facts that I have already told you, and a review by my staff, and a letter went out to the Warden saying to clear that publication in; that the climate of those institutions, based on my knowledge that I have

right now, would—if it was approved in then, then it would be approved in now.

Q. So, the climate hasn't changed since you wrote the letter, at least substantially enough to affect your decision?

A. Yes, that's right.

Q. And, am I correct that the publication—Marion originally rejected this publication on the grounds that it glorified prison unions. Since you are [73] saying that you would allow it in, is it your opinion that it does not glorify prison unions?

A. It was the judgment of my staff that at the time that I told Marion that they would permit it in, that it would not.

Q. And, it does not today, as well?

A. If I approved it in—and, I tell you just from my quick review of it—no, I would let it in.

Q. And, at the time that it was rejected from Marion and rejected on the grounds that it glorified problem inmates, do you also agree that it does not glorify problem inmates?

A. I would approve it in to the institution.

Q. And therefore, you disagree with the statement by the committee at Marion that it glorified problem inmates?

A. I already overruled them.

* * * * *

[78] BY MR. NEY: Having marked Exhibit 43, a letter from the Incoming Publications Committee at Marion regarding the *Call Magazine* from March 25th, 1977, and I would ask you to review the *Call Magazine* which is listed as Henderson Exhibit Number 29, dated March 21st, 1977. [79] Tell me whether, applying the Standard for Incoming Publications, you would allow that publication

into Marion today. I will also tell you that, to the best of my knowledge, this was not appealed to the Regional Director's level, so we are operating under the same assumption that we have in previous hypothetical questions.

MR. DUTTERER: In other words, this is another hypothetical, and he makes assumptions about the institution and the current climate today, and he doesn't have in front of him, information from the Warden, but he makes all these assumptions from a hypothetical—

MR. NEY: Well, he has the rejection letter.

MR. DUTTERER: That's two years old.

MR. NEY: Well, he is assuming that he's getting that letter today, as well as the publication.

MR. DUTTERER: But, in these hypotheticals, he's making these assumptions.

MR. NEY: That's right, the letter states the reason for the rejection of that publication today.

A. Yes, I would let it in.

BY MR. NEY: Q. Did you pay attention, by the way, to [80] the article about the control unit at Marion?

A. Yes.

Q. And, I call your attention to a few things in there. One is a statement that, "Beatings by racist guards were a regular occurrence, and three prisoners have been found hanged in their cells in the last three years"—"suicides, according to Marion officials"—

A. You're not asking me to testify to the accuracy?

Q. No, not to the accuracy, but whether this statement, in your opinion, would be detrimental to the security, good order, and running of the institution.

A. With all the assumptions you have added in talking about it right now, I'd say, yes, I would let it in.

Q. So, you would find that not to be detrimental?

A. That's right.

Q. And, I call your attention to the last paragraph of that article which states, "But, officials have not been able to crush prisoner resistance or halt the spread of revolutionary ideas. Besides the lawsuit, Marion inmates have staged strikes and fasts and have continued to struggle against their oppression." Do you find that paragraph, at the present time, detrimental to the good order, security, and discipline of the institution?

A. It wouldn't help it, but I would let the article in.

* * * * *

[148] Q. You mentioned this morning that one article or one page would be a basis of rejecting a book or publication, is that right?

A. That's right.

Q. What is the reason for not deleting or excising the offending portion and giving the inmate the rest of it?

A. We have never modified any piece of property that was coming in to an inmate. And, if someone else wanted to make that alteration, you know, we may consider that. But, from an Administrator's standpoint, my judgment would be—I get sued enough already. And, that would just be another place for a lawsuit, is to damage something that came in, or change it in such a way to change the whole meaning of the article.

Q. Suppose you had the consent of the prisoner to excise that portion. Would that solve the problem?

A. No.

Q. Why not?

[149] A. Because I would probably be sued by the submitter. They can make that alteration.

Q. Whose publication is it if an inmate has subscribed to it? Are you saying it belongs to the publisher?

A. Until it's delivered.

* * * * *

DEPOSITION OF G. R. McCUNE
ATLANTA, GEORGIA
APRIL 23, 1981

EXAMINATION BY PLAINTIFFS

* * * * *

[49] BY MR. NEY: Q. * * * Would [*Playgirl* magazine] be acceptable today at all institutions in your region? * * *

[50] THE WITNESS: Well, I would have to answer it with the same provisions, depending upon the circumstances at the time, but, basically, as I quickly thumb through this, I would not allow [51] this in to an all-male institution, again, because of the assumption being a magazine like this would only appeal to homosexuals, and identify them. I do not — if I missed any, I do not know if there are any depictions of female homosexuality. Then, I would not generally allow it in to Lexington, but not into a male institution just because of the nude male photograph.

BY MR. NEY:

Q. Suppose I told you, and it was a fact that this publication has been permitted in all-male institutions within the Bureau of a higher security Level 5, and has not caused any discernible problems. Would that change your opinion?

A. No. If it is coming into this region, I am not aware of it, and if I became aware of it, I would make it clear that it should not come in. We sell some magazines in the commissary, but to my knowledge it is not sold in the commissary in a male institution. If it is, then I will correct that when I get to it. I cannot argue with it. It may come in in some places. I do not know. But the rationale that I am using, and all the Wardens should use, would be to prohibit it in all the male institutions.

* * * * *

[57] Q. Does this refresh your recollection about the publication, or the Book of David Kopay?

A. I do not remember the book, particularly. It has been a long time ago. I can see the rationale about rejecting it, if, in fact, it is a blatantly homosexual book. Then, again, as the Warden explained targeting, identifying —

Q. So you would stand by the rationale you gave at that time?

A. Yes, I would. I made it at that time and I have not changed my feelings about it, but I do not remember the book itself.

* * * * *

[59] Q. So you would exclude it from all institutions in this region on the basis that it is encouraging a prohibited act, and on the basis of identification of homosexuality, if you were the Warden?

A. Yes.

* * * * *

[64] THE WITNESS: Probably the prisoners know more about this than this article [in *The Call*, McCune Exhibit 10], anyway, with the Bono case, so there is some inaccuracy in it.

BY MR. NEY:

Q. What was inaccurate?

A. Of course, they are saying that the prisoner is framed for murder. No, I do not see any big problem [65] with it right now in any institution.

* * * * *

[69] Q. I would like to show you: While There is a Soul in Prison, which has a document number of 927, and I believe it was marked as a Cripe exhibit, but I do not [70] know the number. We will mark that as McCune Exhibit Number 12.

(Thereupon Exhibit Number 12 to the deposition was marked for identification by the Reporter.)

BY MR. NEY:

Q. Again, rather than have you read the publication, which is fairly lengthy, I will have you focus on the page, which is entitled: Non-cooperation. It goes on to the next page. Why don't we just start with that. Based on a quick review, if you could, on just the pictorial matter and the publication.

A. Just the pictures?

Q. The pictures, and that one article.

A. I think the problem that some Wardens would have with it, is that it somewhat encourages resistance, or defiance of authority, but to me the article is fairly non-descript. I would not have any big problem with it, but I am sure that is the way it would have to be looked at in a given institution. I do not have any big problem with it, those pictures. Do you want to me to look at any more pictures?

Q. Yes. That would be a basis for rejection?

A. I do not see any pictures that would cause me any trouble.

[71] Q. If a Warden were to reject this publication based on the parts that you have reviewed, the pictures, and the article because it encouraged prisoner strikes, would you sustain that?

A. I would have to do a little bit more than that. If you had a situation in an institution where things were strange, that could indirectly cause some problems, but under normal circumstances, it is not that descript in terms of encouraging prisoners to strike, at least the article I read, and the pictures, I do not see any connection with that really.

* * * * *

[72] Q. When you say you would not let it in, at the present time into an institution in this region?

A. Right now?

Q. Right now.

A. No. I am not talking about that. I am talking at that time.

Q. What about at the present time?

A. I think it could have somewhat the same impact, but I think it was a very sensitive issue at the time. I think what that does, it distorts the issue that we are, in fact, murdering prisoners. I don't think that is the truth at all. I would not allow it in. It is definitely—I would not allow anything like that at the time it was occurring at Leavenworth.

Q. Your position is not to allow it in for the same reason?

[73] A. Yes, for the same reason.

* * * * *

(1)
No. 87-1344

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In the Supreme Court of the United States

OCTOBER TERM, 1988

**EDWIN MEESE III, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS**

v.

JACK ABBOTT, ET AL.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE PETITIONERS

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42 (H)

QUESTION PRESENTED

Whether the court of appeals erred in holding that the constitutionality of prison regulations and policies governing the receipt of publications by federal prisoners should be evaluated under the strict scrutiny standard enunciated in *Procunier v. Martinez*, 416 U.S. 396 (1974).

PARTIES TO THE PROCEEDINGS

In addition to the petitioner named in the caption, the following were defendants in the district court and are petitioners in this Court: Elliott L. Richardson, Norman A. Carlson, Ralph A. Aaron, Noah Allredge, Marvin R. Hogan, George W. Pickett, Elwood O. Toft, Charles Campbell, P.J. Ciccone, Loren E. Daggett, James Henderson, Mason Holley, John J. Norton, Paul Walker, and Samuel J. Britton. Additional petitioners, who are defendants pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, are the current director of the Bureau of Prisons and the current wardens at various federal prisons: J. Michael Quinlan, John Sullivan, Calvin Edwards, Patrick W. Keohane, Gary Henman, Tom C. Martin, Dave Kastner, Al Turner, Joseph Petrovsky, Robert Honstead, Dennis Luther, Roderick D. Brewer, and Robert Matthews.

In addition to the respondent named in the caption, the following were plaintiffs in the district court and are respondents in this Court: the Prisoners' Union, Weekly Guardian Associates, and the Revolutionary Socialist League.

In addition to the various claims for equitable relief, respondents' lawsuit also involves individual damage actions by 82 named plaintiffs. Those claims were severed by the district court in 1979; they have not yet been adjudicated and are not part of the present proceeding.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1344

EDWIN MEESE III, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS

v.

JACK ABBOTT, ET AL.

*ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 824 F.2d 1166. The opinion of the district court (Pet. App. 26a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1987 (Pet. App. 50a-51a). A petition for rehearing was denied on October 13, 1987 (Pet. App. 52a). On December 24, 1987, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 10, 1988. The petition was filed on that date and was granted on April 25, 1988. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION, REGULATIONS, AND PROGRAM STATEMENT INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The pertinent regulations and program statement—28 C.F.R. 540.70 and 540.71 and Bureau of Prisons Program Statement No. 5266.5 (Jan. 2, 1985)—are set forth, in relevant part, as an appendix to this brief (App., *infra*, 1a-4a). They are also reproduced as an appendix to the court of appeals' opinion (Pet. App. 22a-25a).

STATEMENT

This is a nationwide class action brought by federal prisoners in May 1973. The suit challenges the constitutionality of certain regulations and policies of the Federal Bureau of Prisons (BOP) governing the receipt of publications by federal inmates. Numerous federal officials responsible for enforcing those regulations and policies were sued in both their official and individual capacities. In September 1978, the district court ordered the addition, as plaintiffs, of three publishers whose magazines had been rejected at various federal prisons: the Prisoners' Union, Weekly Guardian Associates, and the Revolutionary Socialist League (Pet. App. 2a). On September 13, 1984, following a ten-day bench trial, the district court entered an order upholding the challenged regulations and policies (*id.* at 26a-48a). The court of appeals reversed, holding that the district court had applied an erroneous standard of review. Under a strict scrutiny standard, the

court held, the regulations were unconstitutional on their face (*id.* at 1a-25a).¹

1. a. Under the BOP's regulations, inmates are ordinarily entitled to "subscribe to or to receive publications without prior approval" (28 C.F.R. 540.70(a)).² A publication may be withheld from a prisoner only upon the decision of the warden (28 C.F.R. 540.70(b)), and only if the warden finds that the publication would be "detrimental to the security, good order, or discipline of the institution or [that] it might facilitate criminal activity" (28 C.F.R. 540.71(b)). The warden must review the individual publication before rejecting it; he may not simply establish "an excluded list of publications" (28 C.F.R. 540.71(c)). Moreover, the warden may not reject a publication "solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant" (28 C.F.R. 540.71(b)). Publications that a warden may reject include those that

¹ In addition to resolving respondents' equitable claims involving restrictions on publications, the courts below also adjudicated respondents' challenges to various regulations restricting inmate correspondence. The district court enjoined petitioners from enforcing certain of those regulations, a ruling not appealed by the government, but it upheld the BOP's regulation governing inmate-to-inmate correspondence (Pet. App. 34a-43a, 47a-48a). The court of appeals affirmed the latter ruling (*id.* at 3a-6a), and respondents have not sought review of that aspect of the court of appeals' decision. Accordingly, the validity of the BOP's restrictions on inmate-to-inmate correspondence are not at issue in this Court. Similarly, no issue is raised with respect to individual damage claims brought by 82 named plaintiffs as part of this case. Those claims were severed by the district court in October 1979 (*id.* at 26a n.1) and are still pending.

² The regulations define "publication" as "a book (for example, novel, instructional manual), or a single issue of a magazine or newspaper, plus such other materials addressed to a specific inmate as advertising brochures, flyers, and catalogues" (28 C.F.R. 540.70(a)).

meet one of seven specified criteria.³ The regulations also contain procedures for providing notice and an explanation to the inmate if a publication is rejected and for enabling inmates and publishers to file administrative appeals.⁴ Finally, although it is not set out in the regulations,

³ Those criteria (with brackets reflecting portions that have not been challenged by respondents) are as follows (28 C.F.R. 540.71(b)):

- (1) [It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;]
- (2) It depicts, encourages, or describes methods of escape from correctional facilities, [or contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions;]
- (3) [It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;]
- (4) [It is written in code;]
- (5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;
- (6) It encourages or instructs in the commission of criminal activity;
- (7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

In addition to these criteria, the standards governing sexually explicit publications are contained in BOP Program Statement No. 5266.5 (see App., *infra*, 3a-4a; Pet. App. 24a-25a).

⁴ Under 28 C.F.R. 540.71(d), the warden must "promptly advise the inmate in writing of the decision [rejecting a publication] and the reasons for it." The notice must refer to "the specific article(s) or material(s) considered objectionable" (*ibid.*). The inmate shall be permitted to review the material for purposes of filing an administrative appeal (see 28 C.F.R. 542.15) "unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity" (28 C.F.R. 540.71(d)). The regulations also provide that the warden shall send a copy of the inmate's notice to the publisher or sender of the publication (28 C.F.R. 540.71(e)). Furthermore, the warden is required to "advise the

the BOP's practice is that when any portion of a publication is deemed excludable, the entire publication is withheld (Pet. App. 34a).

b. At trial, respondents presented the testimony of various present and former state correctional officials, correctional experts, and federal prisoners. Those witnesses offered their opinions concerning the need for the BOP's regulations. In addition, respondents offered into evidence 46 publications that had been rejected at various federal prisons.

Petitioners introduced the testimony of several federal correctional officials, a state correctional official, and a social scientist who headed the BOP's training program. Those witnesses similarly offered their opinions concerning the need for the BOP's regulations.

At the conclusion of the trial, the district court took the case under advisement. On September 13, 1984, the court issued a lengthy opinion setting forth its findings of fact and conclusions of law. Based on the evidence at trial and the governing case law, the court held that the BOP's regulations and policies represented a reasonable response to legitimate penological concerns and were therefore constitutional (Pet. App. 28a-32a, 43a-47a).

In its opinion, the court found that at higher-security federal prisons, "minimizing violence is a primary concern" (Pet. App. 28a). The court noted that the problem has been "aggravated" in recent years by "the growth [in prisons] of ethnic gangs," which "engage in organized crime including extortion, drug activity, and homicide" (*ibid.* (footnote omitted)). In addition, the court indicated that homosexual behavior, while prohibited in federal

publisher or sender that he may obtain an independent review of the rejection by writing to the Regional Director within 15 days of receipt of the rejection letter" (*ibid.*).

prisons, is "widespread in the male prisons," and that "[m]any assaults on fellow inmates are precipitated by or manifested in homosexual activity" (*ibid.*).

Addressing the link between publications and security problems, the court found that "publications can present a security threat" (Pet. App. 31a). After summarizing the types of publications that have been rejected at federal prisons (*id.* at 29a),⁵ the court noted that not only "racial publications but materials concerning prison management and prison life" frequently "speak in strident, inflammatory terms," and that "a warden might well find such publications too provocative for his institution at a given time" (*id.* at 31a). In addition, the court noted, "[o]ther publications too might be dangerous to have on hand in a particular facility" (*ibid.*). For example, "a sexual magazine * * * might be undesirable in an institution that has had a high incidence of sexual assault" (*ibid.*). According to the court, "[t]he possible dangerous situations are as various as publications and circumstances at given institutions" (*ibid.*).

The district court held that the BOP's regulations were reasonable because they were directed at "potentially volatile publications" and because they did not contain a "blanket ban" on publications but provided for a "case-

⁵ According to the court, such publications include "sexually explicit" publications, "non-explicit homosexual publications," publications that "preach ethnic superiority, such as the newsletter of the American Nazi Party," publications that "advocate the unionization of prisoners, highlight instances of alleged abuse by prison officials, or state grievances of prisoners generally," publications that "facilitate gambling by giving odds for the week's sporting events," publications relating to "self-defense," and "instructional materials on electronics and radio" (Pet. App. 29a (footnote omitted)). The court stated that "[m]agazines and journals are not excluded by title but are reviewed on an issue-by-issue basis" (*ibid.*).

by-case determination" of acceptability (Pet. App. 47a). The court further held that in light of the differences in circumstances at different times and among different institutions, the BOP was justified in adopting "a standard that gives the warden wide discretion" (*id.* at 31a).

The court rejected respondents' argument that under *Procunier v. Martinez*, 416 U.S. 396 (1974), the burden was on petitioners to show that the regulations furthered an important government interest and were not unnecessarily broad (Pet. App. 43a-44a). The court pointed out that in several post-*Martinez* cases,⁶ the Supreme Court had applied a more deferential standard—*i.e.*, whether there is a rational relationship between the prison regulations and legitimate penological objectives (*id.* at 44a-47a). The court noted (*id.* at 47a) that heightened scrutiny was not required simply because various publishers had joined in challenging the regulations. It reasoned that *Martinez* did not apply because, unlike in that case, "the rights of [the outsiders] are not 'inextricably meshed' with those of inmates" (*id.* at 46a & n.16 (quoting 416 U.S. at 409)). Moreover, the court found that the standard proposed by respondents, which required a " 'likely,' 'immediate,' or 'substantial' threat," could lead to the "admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder" (Pet. App. 32a (footnote omitted)).

The court also rejected respondents' contention that the reasons given by prison officials for rejecting the 46 publications introduced at trial were not sufficiently clear or precise (Pet. App. 32a-33a). The court noted that, while the reasons given did not refer to specific prison risks, the

⁶ *Pell v. Procunier*, 417 U.S. 817 (1974); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Bell v. Wolfish*, 441 U.S. 520 (1979).

government's witnesses "testified * * * that it is unwise to inform inmates of conditions that cause security concerns in the warden" (*id.* at 33a). Finally, the court upheld the BOP's policy of rejecting an entire publication if a portion is found to be excludable (*id.* at 34a).

2. The court of appeals reversed the district court and held that the challenged portions of the BOP's publication regulations were unconstitutional on their face (Pet. App. 6a-21a). While the court did not dispute the district court's finding that the regulations passed muster under a reasonableness standard, the court held that, because the case deals "with some aspect of the First Amendment rights of a non-inmate, and * * * with the expression of ideas on paper," the strict scrutiny standard adopted in *Martinez* is the governing standard (*id.* at 7a-8a). The court found that this Court's post-*Martinez* decisions applying a more deferential standard were distinguishable because those cases dealt with "conduct within the prison, rather than the content of expression" (*id.* at 12a).

The court stated that, under *Martinez*, the proper test is whether a publication "encourage[s] conduct which would constitute, or otherwise [is] likely to produce, a breach of security or order or an impairment of rehabilitation" (Pet. App. 20a). The court found that the BOP's regulations were deficient under that test because they permitted "a far looser causal nexus between expression and proscribed conduct" (*id.* at 15a). The court also struck down the BOP's policy of withholding an entire publication if a portion is deemed excludable (*id.* at 16a-17a).

The court remanded the case to the district court to rule, under a strict scrutiny standard, on whether the BOP had acted lawfully in rejecting the 46 publications that respondents had introduced at trial (Pet. App. 21a).⁷

⁷ The court noted that, because some of the rejections occurred in 1977, "the district court should determine whether and to what extent

SUMMARY OF ARGUMENT

The court of appeals held that the constitutionality of the BOP's regulations and policies governing the receipt of publications by federal inmates must be reviewed under the strict scrutiny standard enunciated in *Procunier v. Martinez*, 416 U.S. 396 (1974). In our view, the court's holding is erroneous because it fails to give proper weight to the judgments of prison officials and to the unique characteristics of penal institutions.

A. This Court has stated that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, No. 85-1384 (June 1, 1987), slip op. 9. Applying that test, the Court has upheld a variety of prison regulations and policies. See *O'Lone v. Estate of Shabazz*, No. 85-1722 (June 9, 1987) (work attendance rules that prevented attendance at weekly religious services); *Block v. Rutherford*, 468 U.S. 576 (1984) (ban on contact visits with nonprisoners); *Bell v. Wolfish*, 441 U.S. 520 (1979) (ban on receipt of hardback books from outside sources); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) (prohibition on prisoners' union meetings, inmate solicitation of other inmates concerning the union, and bulk mailings from outside sources regarding union activities); *Pell v. Procunier*, 417 U.S. 817 (1974) (ban on inmate interviews with members of the press); cf. *Turner v. Safley*, *supra* (apply-

the individual rejections are moot" (Pet. App. 21a). In addition, the court of appeals analyzed, for illustrative purposes, the reasons given by wardens for rejecting five of the publications at issue. The court held that, in each case, the statements could not "be deemed findings of an adequate causal nexus between a rejected publication and a breach of security or order or interference with rehabilitation" (*id.* at 17a-20a).

ing deferential standard to regulations governing inmate-to-inmate correspondence but leaving open question whether strict scrutiny standard should apply to regulations restricting marriages between inmates and outsiders).

B. Notwithstanding this Court's repeated rejection of a heightened scrutiny standard, the court of appeals applied that standard in reviewing the constitutionality of the BOP's regulations and policies governing the receipt of publications by inmates. In doing so, the court relied almost entirely on this Court's decision in *Procunier v. Martinez*, *supra*. In *Martinez*, the Court applied strict scrutiny in striking down prison regulations restricting correspondence between inmates and outsiders.

Martinez was a very narrow decision. The Court emphasized that the class of outsiders involved in that case had a special interest in communicating with specific prisoners (416 U.S. at 408), and it stated that its decision applied only to "direct personal correspondence between inmates and those who have a particularized interest in corresponding with them" (*ibid.* (footnote omitted)). The Court noted (*id.* at 408 n.11) that "[d]ifferent considerations may come into play in the case of mass mailings," and it "intimate[d] no view as to [the] proper resolution" of that issue.

The court of appeals adopted the *Martinez* standard in this case, despite the *Martinez* Court's refusal to extend its analysis to cases such as this one. The court of appeals held the *Martinez* standard applicable because that case, like this one, "deal[t] with some aspect of the First Amendment rights of a non-inmate, and both deal[t] with the expression of ideas on paper and not with conduct qua expression" (Pet. App. 7a-8a).

The court of appeals' distinction between "the expression of ideas on paper" and "conduct qua expression" finds no support in this Court's cases. To the contrary,

several cases in which the Court has applied a reasonableness standard involved restrictions on "the expression of ideas on paper." See *Turner v. Safley*, *supra*; *Jones v. North Carolina Prisoners' Labor Union*, *supra*; *Bell v. Wolfish*, *supra*.

The fact that nonprisoners are affected by a particular regulation is not enough to mandate heightened scrutiny. There is a critical distinction between the interests at stake in *Martinez* and those involved here. *Martinez* involved personalized correspondence from individuals, such as family members and friends. Substantial restrictions on such correspondence would effectively disable the nonprisoners from engaging in the communication that was the reason for their correspondence. In the case of publishers, however, the interests at stake are far less substantial. Unlike correspondents, a publisher and a reader do not engage in personal communication, and the publisher has no particularized interest in communicating with an individual reader. The regulations at issue merely reduce the potential audience for a particular publication by enabling a specific institution to exclude that publication. Because the interests of the publishers are not comparable to the interests of the nonprisoners in *Martinez*, there is no justification for applying the special standard in *Martinez*, rather than the standard generally applicable when prison regulations are subjected to constitutional challenge.

C. In addition to conflicting with the Court's decisions upholding restrictions on inmate conduct, the adoption of the *Martinez* standard in this case would be inconsistent with this Court's cases involving nonpublic forums. Those cases make clear that regulations governing nonpublic forums must be upheld if they are "reasonable in light of the purpose which the forum at issue serves." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S.

37, 49 (1983) (footnote omitted). A reasonableness standard applies in such cases because, in a nonpublic forum, outsiders have no generalized right to distribute materials or engage in other First Amendment activity. The court of appeals, by applying strict scrutiny, erroneously treated prisons as if they were public forums, even though they "most emphatically" are not (*Prisoners' Union*, 433 U.S. at 136).

D. Finally, the standard adopted by the court of appeals is unsound as a matter of policy and would lead to serious practical problems within prisons. As the district court found (Pet. App. 32a), publications may very well threaten prison security even where prison officials cannot sustain their evidentiary burden, under a strict scrutiny standard, of showing that the publications are likely to be directly linked to violence or disruption.

Contrary to the court of appeals' assumption, the reasonableness standard is not without substance; it provides protection to publishers or inmates in cases where the prison's security concerns are irrational or greatly exaggerated. At the same time, however, that standard gives prison administrators the flexibility to enable them to perform the difficult task of maintaining security and good order without having every decision they make subject to exacting scrutiny by a court.

ARGUMENT

THE BUREAU OF PRISONS' REGULATIONS GOVERNING THE RECEIPT OF PUBLICATIONS BY INMATES SHOULD BE JUDGED UNDER A REASONABLENESS STANDARD

The question in this case is whether the court of appeals applied the correct standard of review in evaluating the constitutionality of the BOP's regulations and policies

governing the receipt of publications by federal prisoners. The court held that those regulations and policies must be tested under the heightened scrutiny standard of *Procunier v. Martinez*, 416 U.S. 396, 413 (1974), *i.e.*, whether prison officials demonstrated that the regulations or policies "further an important or substantial governmental interest unrelated to the suppression of expression" and are "no greater than is necessary or essential to the protection of the particular governmental interest involved" (Pet. App. 8a (quoting 416 U.S. at 413)). The court of appeals rejected the government's claim that a more deferential standard was appropriate (Pet. App. 10a).

It is our submission that the court of appeals applied an incorrect standard. This Court, in every prison case decided since *Martinez*, has indicated that a prison regulation or policy must be sustained if it "is reasonably related to legitimate penological interests." *Turner v. Safley*, No. 85-1384 (June 1, 1987); accord *O'Lone v. Estate of Shabazz*, No. 85-1722 (June 9, 1987), slip op. 5-6; *Block v. Rutherford*, 468 U.S. 576, 586, 589 (1984); *Bell v. Wolfish*, 441 U.S. 520, 550-551 (1979); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125, 128 (1977); *Pell v. Procunier*, 417 U.S. 817, 827 (1974). In rejecting a "reasonableness" standard, the court of appeals viewed *Martinez* as controlling. But *Martinez* was a narrow decision based on the substantial impact of particular regulations on the rights of a unique category of non-prisoners. That decision is not applicable in the present case, which involves, at most, merely an incidental impact on publishers.

Moreover, as we explain below, a heightened scrutiny standard would subject prison administrators to a burden that is generally insurmountable, thereby forcing prisons to admit publications that may lead to serious safety and security problems. We submit that a reasonableness stand-

ard best balances the interests of publishers (and inmates seeking to receive publications) against the need for prison security.

A. As A General Rule, Prison Regulations And Policies Must Be Upheld If They Are Reasonably Related To Legitimate Penological Objectives

This Court has identified two principles that govern the analysis of inmates' constitutional rights. The first principle is that "federal courts must take cognizance of the valid constitutional claims of prison inmates" (*Turner*, slip op. 4). Thus, prisoners retain a variety of constitutional rights notwithstanding the fact of their incarceration. See, e.g., *Bounds v. Smith*, 430 U.S. 817 (1977) (access to courts); *Estelle v. Gamble*, 429 U.S. 97 (1976) (Eighth Amendment); *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (due process); *Johnson v. Avery*, 393 U.S. 483 (1969) (access to courts). Of course, a corollary of that principle is that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948). See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (noting that "prisoners have no legitimate expectation of privacy and * * * the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells").

The second principle is "the recognition that 'courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform' " (*Turner*, slip op. 5 (quoting *Martinez*, 416 U.S. at 405)). As this Court has explained, "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the Legislative and Executive

Branches of Government" (*Turner*, slip op. 5). An "essential" objective in running a prison is "maintaining institutional security and preserving internal order and discipline" (*Wolfish*, 441 U.S. at 546). To carry out that objective, prison officials must be given "wide-ranging deference" in the way they run their prisons (*Prisoners' Union*, 433 U.S. at 126). Judicial deference is essential "not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge" (*Wolfish*, 441 U.S. at 548), but also because of "separation of powers concerns" (*Turner*, slip op. 5). In addition, deference is appropriate because of the unique characteristics of penal institutions. Prisons are "closed, tightly controlled environment[s] peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." *Wolff v. McDonnell*, 418 U.S. 539, 561 (1974); see also *Prisoners' Union*, 433 U.S. at 137 (Burger, C.J., concurring). For that reason, "rules far different from those imposed on society at large must prevail within prison walls," and judges "are not equipped by experience or otherwise to 'second guess' the decisions" of legislators or administrators "except in the most extraordinary circumstances" (*ibid.*).

In a series of cases involving challenges to prison regulations and policies, the Court has applied these two principles in selecting the standard of review to govern prisoners' constitutional complaints. In each case, the Court has refused to apply a heightened scrutiny standard, but has instead adopted a reasonableness standard. See *Pell v. Procunier*, *supra*; *Jones v. North Carolina Prisoners' Labor Union*, *supra*; *Bell v. Wolfish*, *supra*; *Block v. Rutherford*, *supra*; *Turner v. Safley*, *supra*; *O'Lone v. Estate of Shabazz*, *supra*.

Thus, in *Pell*, the Court rejected a First Amendment challenge by various prisoners and journalists to a California prison regulation that prohibited face-to-face media interviews with individual prisoners. The Court noted that the security concerns upon which the regulation was based were "peculiarly within the province and professional expertise of correction officials" and were therefore entitled to deference (417 U.S. at 827).⁸

In *Prisoners' Union*, the Court upheld a prison's ban on union meetings, union membership solicitation, and bulk mailings of union publications for distribution within the prison. The Court stated that "[t]he necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this" (433 U.S. at 128).

In *Wolfish*, the Court upheld, against a First Amendment challenge, a rule restricting prisoners' receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores. Stressing the need for deference to the "considered judgment" of prison experts, the Court found the rule to be a "rational response" to a bona fide security problem (441 U.S. at 550-551). Similarly, in *Rutherford*, the Court upheld a prison's ban on contact visits with nonprisoners on the ground that such a ban was "reasonably related" to legitimate security concerns, as determined by "responsible, experienced administrators" (468 U.S. at 586, 589).

Finally, in two cases decided last Term, *Turner* and *Shabazz*, the Court made clear that *all* inmate challenges to the constitutionality of prison regulations must be

⁸ Similar policies of the Federal Bureau of Prisons were upheld by the Court in *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), which was decided the same day as *Pell*.

assessed under a reasonableness test. In *Turner*, the Court upheld regulations governing inmate-to-inmate correspondence.⁹ And in *Shabazz*, the Court upheld against a First Amendment challenge a prison's work assignment rules that had the effect of preventing inmates from attending a weekly Muslim congregational service held at the prison. In both *Turner* and *Shabazz*, the Court rejected the lower courts' holdings that a heightened scrutiny standard was the proper one (*Turner*, slip op. 8; *Shabazz*, slip op. 6-7). In so doing, the Court stated in no uncertain terms that " 'when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests' " (*Shabazz*, slip op. 5-6 (quoting *Turner*, slip op. 9)).

In both *Turner* and *Shabazz*, the Court rejected prisoners' arguments that the reasonableness standard should govern only in a limited category of cases. Thus, the Court refused to endorse the position that the reasonableness test should apply solely to " 'presumptively dangerous' conduct" (*Shabazz*, slip op. 6 note *; *Turner*, slip op. 8). According to the Court, "[t]he determination that an activity is 'presumptively dangerous' appears simply to be a conclusion about the reasonableness of the prison restriction in light of the articulated security concerns" (*Turner*, slip op. 9). Such a determination, the Court noted (*ibid.*), "provides a tenuous basis for creating a hierarchy of standards of review." Similarly, the Court rejected the argument that "heightened scrutiny is appropriate whenever regulations effectively prohibit,

⁹ The Court struck down, under a reasonableness test, regulations prohibiting most inmate marriages (*Turner*, slip op. 17). In addition, the Court noted (*ibid.*), without deciding the issue, that regulations governing marriages between inmates and outsiders might be governed by heightened scrutiny because of the impact on nonprisoners.

rather than simply limit, a particular exercise of constitutional rights" (*Shabazz*, slip op. 6 n.*). According to the Court, "the presence or absence [of] alternative accommodations of prisoners' rights is properly considered a factor in the reasonableness analysis rather than a basis for heightened scrutiny" (*ibid.*).

In light of *Turner* and *Shabazz*, there can no longer be any dispute that *all* inmate challenges to prison regulations or policies must be governed by a "reasonableness" standard. The Court has made clear its unwillingness, even where claims are made under the First Amendment, to " 'substitute [its] judgment on * * * difficult and sensitive matters of institutional administration' for the determinations of those charged with the formidable task of running a prison" (*Shabazz*, slip op. 10 (quoting *Rutherford*, 468 U.S. at 588)).

B. This Court's Decision In *Procunier v. Martinez* Does Not Require Heightened Scrutiny In The Present Case

Notwithstanding this Court's repeated rejection of a heightened scrutiny standard, the court of appeals applied that standard in evaluating the BOP's regulations and policies governing the admission of publications. The court determined (Pet. App. 7a-8a) that a strict scrutiny standard was mandated by this Court's decision in *Procunier v. Martinez*, *supra*. In fact, however, *Martinez* involved a completely different factual setting and is not controlling here.

In *Martinez*, the Court was faced with a constitutional challenge to California prison regulations that prohibited letters between inmates and noninmates that "unduly complain" or "magnify grievances," "express[] inflammatory political, racial, religious, or other views or beliefs," "pertain to criminal activity," are "lewd, obscene, or defamatory; contain foreign matter, or are otherwise

inappropriate" (416 U.S. at 399-400 (citations and footnotes omitted)). Although many of those restrictions arguably would not have survived even under a reasonableness standard, the Court applied strict scrutiny because the regulations imposed a substantial burden on the First Amendment rights of nonprisoners (*id.* at 408).

As the Court's opinion makes clear, *Martinez* was a very narrow decision. The Court emphasized that the outsiders had a special interest in communicating with specific prisoners (416 U.S. at 408). To illustrate the point, the Court noted that "[t]he wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him" (*id.* at 409).

Significantly, the Court in *Martinez* stated that the decision in that case applied only to "direct personal correspondence between inmates and those who have a particularized interest in communicating with them" (416 U.S. at 408). The Court noted that "[d]ifferent considerations may come into play in the case of mass mailings" (*id.* at 408 n.11). With respect to materials of that nature, the Court "intimate[d] no view" as to the proper standard to apply.

The court of appeals concluded that the *Martinez* standard was controlling in this case, despite the *Martinez* Court's express refusal to extend its analysis to cases such as this one. According to the court of appeals (Pet. App. 7a-8a), *Martinez* was dispositive because both that case and this one "deal with some aspect of the First Amendment rights of a noninmate, and both deal with the expression of ideas on paper and not with conduct qua expression." We submit that neither of the two grounds relied upon by the court of appeals for applying *Martinez* can withstand scrutiny.

The court of appeals' distinction between "the expression of ideas on paper" and "conduct qua expression" finds no support in *Martinez* itself and is contrary to all of this Court's post-*Martinez* decisions. If the court of appeals' standard were applied logically, heightened scrutiny would be required whenever the "expression of ideas on paper" is involved, even if only prisoners' claims are at issue. Yet, as we have noted, this Court has made clear that *all* claims that prison regulations violate inmates' constitutional rights must be reviewed under a reasonableness standard. See *Shabazz*, slip op. 5-6; *Turner*, slip op. 9. Indeed, several cases that have applied a reasonableness standard plainly involve restrictions on "the expression of ideas on paper." See *Turner v. Safley*, *supra* (upholding restrictions on inmate-to-inmate correspondence); *Jones v. North Carolina Prisoners' Labor Union*, *supra* (upholding, inter alia, ban on the receipt by prisoners of bulk mailings about unions); *Bell v. Wolfish*, *supra* (upholding rule restricting prisoners' receipt of hardback books, except where such books are mailed directly from publishers, book clubs, or book stores).¹⁰ We know of no decision by this Court that supports the court of appeals' conclusion that heightened scrutiny should apply in reviewing prison regulations simply because ideas expressed on paper are involved.

The court of appeals is equally incorrect in holding that, under *Martinez*, strict scrutiny is required merely because the rights of nonprisoner publishers are involved. To begin with, there is a critical distinction between the rights at stake in *Martinez* and those of the outsiders here. *Martinez*

¹⁰ The court of appeals is simply wrong in distinguishing those cases as dealing with "action and conduct occurring or threatened within the prisons" rather than with the "expression of ideas on paper" (Pet. App. 10a; see Pet. App. 7a).

involved correspondence from individuals, such as family members and friends, who have a direct personal relationship with a particular inmate. Substantial restrictions on personal correspondence with inmates would amount to a prohibition against communication of that kind. In the case of publishers, however, the interests at stake are far less substantial. Unlike correspondents, a publisher and a reader do not engage in "personal" communication (*Martinez*, 416 U.S. at 408), and a publisher has no "particularized interest" (*ibid.*) in distributing its publication to any individual reader. Moreover, the regulations at issue in this case affect publishers in only the most indirect way. They do not prohibit a publisher from printing a particular article or distributing it to the general public. Rather, out of a universe of potential readers, the regulations simply reduce the potential audience for a particular issue of a publication by preventing a specific institution from receiving it at a particular time. Furthermore, with the exception of those specific publications that are determined to pose a danger to a particular institution at a particular time, publishers are free to send their publications to federal inmates. See 28 C.F.R. 540.70(a).

This Court's post-*Martinez* decisions refute the court of appeals' apparent assumption that an impact on outsiders, however indirect, triggers strict scrutiny review. In several cases, the Court has upheld prison restrictions under a deferential standard of review, even though the constitutional rights of outsiders were involved to some extent. For example, in *Block v. Rutherford*, *supra*, the Court upheld, under a reasonableness standard, a blanket prohibition on contact visits with nonprisoners. The respondent in that case, relying on *Martinez*, unsuccessfully argued for heightened scrutiny on the ground that the rights of outsiders—the visitors—were involved (see *Rutherford* Resp. Br. 32). Similarly, in *Pell v. Procunier*,

supra, the Court applied a reasonableness standard and upheld a regulation prohibiting face-to-face media interviews with individual inmates. That regulation, of course, had a direct and immediate impact on members of the press and the public at large. *Pell* and *Rutherford* thus demonstrate that *Martinez* does not stand for the broad proposition that the court of appeals attributed to it: that strict scrutiny must be applied to any prison regulation that somehow affects the rights of nonprisoners.

C. A Heightened Scrutiny Standard Would Undermine This Court's Decisions Involving Nonpublic Forums

By extending *Martinez* to apply to outside publishers, the court of appeals not only disregarded this Court's cases dealing with constitutional claims in the prison context, it also ignored a separate but parallel line of authority: the Court's decisions involving nonpublic forums. The court of appeals erroneously treated prisons as if they were public forums, even though they "most emphatically" are not. *Prisoners' Union*, 433 U.S. at 136; see also *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 & n.9 (1983).

This Court has made clear that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). Thus, while "the most exacting scrutiny" applies in the context of public forums when the government seeks to regulate communication, *e.g.*, *Boos v. Barry*, No. 86-803 (Mar. 22, 1988), slip op. 7, different standards apply in the case of nonpublic forums. *Perry*, 460 U.S. at 46. In a nonpublic forum, outsiders have no generalized right to distribute materials or engage in other First Amendment activity. See, *e.g.*, *Greer v. Spock*, 424

U.S. 828, 838-840 (1976) (upholding regulations prohibiting demonstrations and partisan political speeches on military bases and barring distribution of publications deemed detrimental to the functioning of the base); *Adlerley v. Florida*, 385 U.S. 39, 47-48 (1966) (rejecting argument that demonstrators have a constitutional right to speak and protest within a jail facility). Thus, "[i]n addition to time, place, and manner regulations, the [government] may reserve the [nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46. Furthermore, in a nonpublic forum, distinctions that "may be impermissible in a public forum" are "inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property" (*Perry*, 460 U.S. at 49). See generally *Hazelwood School Dist. v. Kuhlmeier*, No. 86-836 (Jan. 13, 1988), slip op. 9 (holding that the high school newspaper at issue was not a public forum and that "school officials were entitled to regulate the contents of [the newspaper] in any reasonable manner"); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (upholding city's ban on political advertisements in rapid transit system because a public forum was not involved and restriction was based on legitimate concerns involving, *inter alia*, claims of favoritism that likely would arise in the allocation of limited space).

These principles involving nonpublic forums are directly applicable here. Since prisons are not public forums, publishers have no generalized right to distribute their publications within prison facilities. Rather, prisons are permitted to impose "reasonable" restrictions (*Perry*, 460 U.S. at 46)—even restrictions that would be unconstitu-

tional if they were applied to public forums. This standard of reasonableness, of course, is the same one that, under *Turner*, *Shabazz*, and several other cases, is applicable to inmates' challenges to prison regulations. By holding the BOP to a strict scrutiny standard, the court of appeals erroneously extended to publishers a broad right to disseminate written materials in prisons, a right that simply does not exist in the case of a nonpublic forum.

To be sure, even in a nonpublic forum, the government may not "suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46. But no such suppression is involved here. The BOP's regulations, as written and as applied, are concerned solely with publications that threaten security, discipline, or good order (see App., *infra*, 1a; Pet. App. 22a). Indeed, the regulations expressly provide that "[t]he Warden may not reject a publication solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant" (*ibid.* (emphasis added)). Since the regulations do not restrict speech merely because of a disagreement over its content, the government is permitted to "make distinctions in access on the basis of subject matter and speaker identity." *Perry*, 460 U.S. at 49. See generally *Prisoners' Union*, 433 U.S. at 133 (upholding prison regulations on bulk mailings from unions even though similar restrictions had not been imposed on bulk mailings from the Jaycees, Alcoholics Anonymous, and the Boy Scouts).

D. A Heightened Scrutiny Standard Would Create Serious Practical Problems For Prison Officials And The Courts

In addition to conflicting with the standard of review applied by this Court in numerous decisions involving prisons and other nonpublic forums, the standard adopted by the court of appeals would lead to serious practical

problems within federal prisons. As this Court recently noted, "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration" (*Turner*, slip op. 9). The result of such a restriction could be extremely serious for inmates and officials alike, since it is well known that "[p]rison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagration" (*Prisoners' Union*, 433 U.S. at 132). Because prisons "are places of involuntary confinement of persons who have a demonstrated proclivity for anti-social criminal, and often violent, conduct," *Hudson v. Palmer*, 468 U.S. 517, 526 (1984), officials must be allowed "to take reasonable steps to forestall * * * a threat * * * before the time when they can compile a dossier on the eve of a riot" (*Prisoners' Union*, 433 U.S. at 132-133 (footnote omitted)).

These concerns are fully applicable to the present case. As the district court found (Pet. App. 28a), the evidence at trial revealed that prison violence is a serious problem, particularly at higher security facilities. Nonetheless, while a warden may have a legitimate fear that a particular publication will cause problems, he will rarely be able to prove a *likelihood* of violence or disorder as a result of the admission of a particular publication. The inability to prove the existence of a substantial security risk in a particular case does not necessarily mean that the warden's fears are exaggerated. As the district court found (*id.* at 32a), requiring strict scrutiny review "could result in admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder."

The number of publications actually rejected by the BOP in recent years has been quite small.¹¹ At the same time, the BOP believes that certain publications have a considerable potential for disruptive effect, even though it would be difficult to prove that potential effect in a particular case. We submit that in order to maintain security and minimize the risks of disorder within their institutions, BOP officials must retain the right to reject publications without having to satisfy a strict scrutiny test of the sort imposed by the court of appeals.

Several publications introduced at trial as examples of materials that, in respondents' view, were improperly excluded by federal prisons illustrate the basis of our concern. For example, an issue of *Drummer* magazine (Resp. Exh. 20) contains a series of photographs, drawings, and articles depicting, in explicit detail, a wide range of sadomasochistic homosexual acts. An issue of the *NS Report* (Resp. Exh. 21), a publication of the American Nazi Party, contains various white supremacist articles glorifying violent, physical assaults on blacks. An issue of *Hustler* magazine (Resp. Exh. 19) contains depictions of bestiality as well as several photographs featuring a nude child posing with an adult model. And an issue of *Soldier of Fortune* (Resp. Exh. 124) contains a martial arts article accompanied by photographs that demonstrate how to disarm and disable an armed assailant. Although it would seem obvious that such material has no place in a prison, respondents have maintained throughout this case that, under the *Martinez* standard, these and numerous other publications cannot be excluded from federal prisons. We

¹¹ For example, the BOP advises us that during the one-year period between September 1, 1986, and August 31, 1987, an estimated 1,728 publications were withheld by federal prisons out of approximately 1.8 million publications sent to federal inmates.

submit that a standard that compels the admission of such articles cannot be correct.

Another problem with the heightened scrutiny standard is that it would in effect shift from prison administrators to the courts the decision whether to admit specific publications. In virtually every case in which a publication has been withheld, a prisoner can make a nonfrivolous claim under a strict scrutiny standard that the publication should have been admitted. As this Court recently noted (*Turner*, slip op. 9), a heightened scrutiny analysis would "distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." As a result, "[c]ourts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem" (*ibid.*).

It is important to emphasize that the reasonableness test is not a toothless one; it does not leave inmates and publishers without an effective remedy in cases involving arbitrary or irrational rejections of publications. For instance, in *Turner* the Court struck down, under a reasonableness standard, a prison regulation that prohibited most inmate marriages, reasoning that the regulation constituted an exaggerated response to security and rehabilitation concerns (see slip op. 15-20); see also *Green v. Ferrell*, 801 F.2d 765, 772 (5th Cir. 1986) (citation omitted) (striking down prison ban on newspapers and magazines as an "exaggerated response" to security concerns); *Mann v. Smith*, 796 F.2d 79, 82 (5th Cir. 1986) (prison ban on newspapers struck down under deferential standard).¹² A reasonableness test is thus responsive both

¹² The application of a similar standard (a rational basis test) in the equal protection area confirms that such a standard has substance. See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S.

to the First Amendment concerns at stake and to the needs of prison administrators in their efforts to maintain security and good order.

* * * * *

The district court, applying a reasonableness test, upheld the constitutionality of the BOP's prison regulations (Pet. App. 31a-32a, 46a-47a). It further upheld the BOP's "all or nothing" policy of excluding an entire publication if any portion is deemed objectionable (*id.* at 34a). And that court rejected respondents' contention that the reasons given by prison officials for rejecting the 46 publications introduced at trial were not sufficiently clear or precise (*id.* at 32a-33a). The court of appeals, without deciding whether the regulations and policies were valid under a reasonableness standard, ruled that those regulations and policies could not survive strict scrutiny (*id.* at 15a-17a). The court did not rule on the propriety of the BOP's exclusion of the 46 articles introduced at trial by respondents. Instead, while it noted by way of example that the reasons given by the BOP for the exclusion of five of the articles could not withstand scrutiny (see *id.* at 18a-20a), it remanded the matter to the district court for individualized review of the 46 articles under the *Martinez* standard (*id.* at 20a-21a).¹³

432, 447-450 (1985) (requirement of a special use permit for group home for the mentally retarded did not satisfy deferential standard); *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982) (state program of distributing income derived from natural resources based on length of residence held to be irrational and therefore a violation of equal protection).

¹³ The court of appeals noted that some of the rejections occurred as far back as 1977 and that, as to some publications, there may no longer be a live controversy concerning admissibility (Pet. App. 21a).

We believe that the district court was correct in upholding the BOP's regulations, under a reasonableness standard, against a claim of facial invalidity. The regulations permit the exclusion of particular publications only if they are found to be "detrimental to the security, good order, or discipline of the institution," or if they "might facilitate criminal activity" (28 C.F.R. 540.71(b)). To provide guidance to wardens, the regulations contain a nonexclusive list of criteria that justify rejection (see 28 C.F.R. 540.71(b)(1)-(7)). The regulations also make clear that a warden's discretion has limits; thus, a publication may not be rejected simply because "its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant" (28 C.F.R. 540.71(b)). Moreover, the regulations prohibit a warden from establishing an "excluded list of publications" (28 C.F.R. 540.71(c)); instead, the warden must review the specific publication prior to rejecting that publication (*ibid.*). Finally, an appeals procedure is available to publishers and inmates who are dissatisfied with the warden's decision rejecting a publication (see 28 C.F.R. 540.71(d)).

It is apparent that the regulations are drafted to address legitimate security risks within a prison. Indeed, those same concerns are the very type that this Court has held to be "legitimate penological interests." *Turner v. Safley*, slip op. 9; *Pell v. Procunier*, 417 U.S. at 823; *Procunier v. Martinez*, 416 U.S. at 412. The fact that the regulations do not require the warden to find the risk of disruption in the case of a particular publication to rise to the level of a high probability does not render the regulations facially invalid. As this Court stated in *Prisoners' Union*, 433 U.S. at 132, all that is required under a reasonableness standard to justify the curtailment of otherwise protected activities is that the prison officials, "in the exercise of their informed

discretion, reasonably conclude that [the activities] possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment." It is precisely that standard that the BOP regulations embody. Of course, even if the regulations are held facially valid, that does not bar constitutional challenges to particular exclusion decisions. If the regulations are applied in a particular instance in a way that violates the reasonableness standard, by reflecting an exaggerated or irrational response to the perceived danger, the application of the regulations can be challenged in that particular case.

While we believe that the court of appeals erred by holding the BOP's regulations to be invalid on their face, we recognize that this Court may wish to leave that issue to the lower courts for disposition on remand. The resolution of that issue will require analysis of each of the individual sections of the regulations. Even under a reasonableness standard, the regulations need not be declared either constitutional or unconstitutional in their entirety. Cf. *Prisoners' Union*, 433 U.S. at 138-139 (Stevens, J., concurring in part and dissenting in part). Respondents conceded below that portions of the regulations are constitutional even under a strict scrutiny test (Pet. App. 15a), and they apparently contend that other portions of the regulations cannot satisfy even a reasonableness test. The court of appeals has not had occasion to determine whether the regulations would be sustained, in whole or in part, under a reasonableness standard, and the Court may wish to have the benefit of that court's analysis rather than reaching that issue on its own.

In addition, there are several subsidiary factual issues that clearly should be remanded to the court of appeals for consideration under a reasonableness standard. To begin

with, there is an issue concerning the constitutionality of the BOP's "all or nothing" policy—*i.e.*, the policy of rejecting an entire publication if any portion is found to be excludable. That issue can only be determined after a detailed analysis of the evidence in this case. The validity of that policy will depend, among other things, on the security and administrative justifications for that policy, the availability of alternative courses of action, and the costs and risks associated with employing those alternatives. See *Turner v. Safley*, slip op. 10-11. In addition, the question as to whether the 46 publications introduced by respondents at trial were properly rejected is one that should be left to the lower courts on remand. That question involves factual issues as to the nature of each of the publications, the perceived dangers presented by each, and even whether there continues to be a live controversy with respect to particular publications.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further consideration under a reasonableness standard of review.

Respectfully submitted.

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APPENDIX

Pertinent Regulatory Provisions

28 C.F.R. 540.70

(a) The Bureau of Prisons permits an inmate to subscribe to or to receive publications without prior approval and has established procedures to determine if an incoming publication is detrimental to the security, discipline, or good order of the institution or if it might facilitate criminal activity. The term publication, as used in this rule, means a book (for example, novel, instructional manual), or a single issue of a magazine or newspaper, plus such other materials addressed to a specific inmate as advertising brochures, flyers, and catalogues.

(b) The Warden may designate staff to review and where appropriate to approve all incoming publications in accordance with the provisions of this rule. Only the Warden may reject an incoming publication.

28 C.F.R. 540.71

* * * * *

(b) The Warden may reject a publication only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity. The Warden may not reject a publication solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant. Publications which may be rejected by a Warden include but are not limited to publications which meet one of the following criteria:

(1) [It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;]

(2) It depicts, encourages, or describes methods of escape from correctional facilities, [or contains

blueprints, drawings or similar descriptions of Bureau of Prisons institutions;]

(3) [It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;]

(4) [It is written in code;]

(5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;

(6) It encourages or instructs in the commission of criminal activity;

(7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

(c) The Warden may not establish an excluded list of publications. This means the Warden shall review the individual publication prior to the rejection of that publication. Rejection of several issues of a subscription publication is not sufficient reason to reject the subscription publication in its entirety.

(d) Where a publication is found unacceptable, the Warden shall promptly advise the inmate in writing of the decision and the reasons for it. The notice must contain reference to the specific article(s) or material(s) considered objectionable. The Warden shall permit the inmate an opportunity to review this material for purposes of filing an appeal under the Administrative Remedy Procedure unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity.

(e) The Warden shall provide the publisher or sender of an unacceptable publication a copy of the rejection letter. The Warden shall advise the publisher or sender that he may obtain an independent review of the rejection by writing to the Regional Director within 15 days of receipt of the rejection letter. The Warden shall return the rejected publication to the publisher or sender of the material unless the inmate indicates an intent to file an appeal under the Administrative Remedy Procedure, in which case the Warden shall retain the rejected material at the institution for review. In case of appeal, if the rejection is sustained, the rejected publication shall be returned when appeal or legal use is completed.

The bracketed language in § 540.71(b) is not challenged by the plaintiffs.

Program Statement No. 5266.5 reads, in part, as follows:

(a) A Warden may determine that sexually explicit material of the following types is to be excluded, as potentially detrimental to the security, or good order, or discipline of the institution, or facilitating criminal activity:

(1) Homosexual (of the same sex as the institution population).

(2) Sado-masochistic.

(3) Bestiality.

(4) Involving children.

(b) The following points should be emphasized:

(1) It is the local Warden's decision (except for the child-model materials, which are prohibited by law)—a sexually explicit homosexual publication for example may be admitted if it is determined not to pose a threat at the local institution;

(2) Explicit heterosexual material will ordinarily be admitted;

(3) Sexually explicit material does not include material of a news or information type — publications covering the activities of gay rights organizations or gay religious groups, for example, should be admitted;

(4) Literary publications should not be excluded, solely because of homosexual themes or references, if they are not sexually explicit, and

(5) Sexually explicit material may nonetheless be admitted if it has scholarly value, or general social or literary value.

QUESTION PRESENTED

Whether the court of appeals correctly held that the constitutionality of regulations and policies governing content-based censorship of publications mailed by publishers to individual federal prisoners should be evaluated under the First Amendment standard established in *Procunier v. Martinez*, 416 U.S. 396 (1974) so that the district court on remand should determine (1) whether important and substantial governmental interests in security, order and rehabilitation are furthered by the prison regulations and practices at issue; and (2) whether the limitations of First Amendment freedoms are no greater than necessary or essential to protect the particular governmental interest involved?

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**IN THE
Supreme Court of the United States
October Term, 1988**

No. 87-1344

RICHARD L. THORNBURGH, Attorney General
of the United States, et al.,
Petitioners,

v.

JACK ABBOTT, et al.,
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit**

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This case presents a partial challenge to the publications censorship policy of the federal Bureau of Prisons, under which prison censors have rejected such publications as: an issue of *WIN Magazine* [Workshop In Nonviolence], containing an article critical of the federal prison industries program (J.L. 52-88);¹ *The David Kopay Story* (Bantam Books, 1977), the

¹"J.L." refers to the Joint Lodging; "P.A." refers to Petitioner's Appendix on Writ of Certiorari; "C.A." refers to the Appendix in the Court of Appeals; "Jt.A." refers to the Joint Appendix; "T." refers to pages of the trial transcript; "Dep." refers to the depositions which were admitted into evidence (T. 1548, 1551) [where no other record references are available]; "Adm." refers to the Defendants' [Petitioners'] Response to Plaintiffs' Requests for Admissions.

autobiography of a professional football player who is a homosexual (Respondents Lodging; P.Exh. 83); an issue of *Labyrinth* magazine (J.L. 18) that criticizes medical care at the Terre Haute penitentiary based on events discussed in *Carlson v. Green*, 446 U.S. 14, 16 n.1 (1980); an issue of *The Call*, describing the Control Unit of the Marion penitentiary as a "hell hole" and reporting the filing of a lawsuit that later resulted in findings of Eighth Amendment and due process violations. (J.L. 7; P.A. 18a).²

Respondents, a class of federal prisoners and several publishers whose written materials have been censored, challenge portions of the censorship policy on its face and as applied to 46 specific books and publications. (J.L. 1-3).

A. The Administrative Censorship Scheme

As aptly described by the district court, the censorship policy confers "broad discretion" on the warden of each institution (P.A. 29a), who is empowered to bar any book or periodical deemed "detrimental to the security, good order or discipline of the institution, or if it might facilitate criminal activity." 28 C.F.R. §540.71(b) (P.A. 22a). The scope of the warden's authority is indicated by seven illustrative guidelines set forth in the Bureau's regulations. 28 C.F.R. §540.71(b)(1)-(7) (P.A. 22a-23a). The district court found that the warden's discretion was not "appreciably limited" by these non-exhaustive guidelines (P.A. 29a), four of which are also challenged in this lawsuit as vague and overbroad. They allow a warden to reject a publication if:

²See *Bono v. Saxbe*, 450 F.Supp. 934 (S.D. Ill. 1978), aff'd in part and remanded on other grounds, 620 F.2d 609 (7th Cir. 1980).

— "It depicts...or describes methods of escape from correctional facilities..." 28 C.F.R. §540.71(b)(2);

— "It depicts, [or] describes...activities which may lead to the use of physical violence or group disruption," 28 C.F.R. §540.71(b)(5);

— "It...instructs in the commission of criminal activity," 28 C.F.R. §540.71(b)(6);

— "It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity," 28 C.F.R. §540.71(b)(7).³

In the district court, respondents challenged the Bureau's use of the word "encourages" in guidelines (b)(2), (b)(5), and (b)(6). That challenge is no longer being pressed in light of the decision below construing the word "encourage" as used in the guidelines to be consistent with this Court's decision in *Procunier v. Martinez*, 416 U.S. 396 (1974). (P.A. 15a-16a).

Applying this policy, the Bureau has censored hundreds of publications and books mailed by publishers to prisoners. (Jt.A. 113-127). In part, this results from the Bureau's unwritten

³Several of the guidelines are not challenged here. These allow a warden to censor a publication if:

— "It depicts or describes procedures for the construction or use of weapons, ammunition, bombs, or incendiary devices," 28 C.F.R. §540.71(b)(1);

— "It... contains blueprints, drawings, or similar descriptions of Bureau of Prisons institutions," 28 C.F.R. §540.71(b)(1);

— "It depicts, or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs," 28 C.F.R. §540.71(b)(3); or

— "It is written in code," 28 C.F.R. §540.71(b)(4).

"all-or-nothing" rule which requires a warden to reject an entire book or publication if any portion is deemed objectionable — whether it be a paragraph, a page, or one article among many. (P.A. 16a, 34a; Jt.A. 80-81, 100-101, 105).

Rejected books or magazines are returned to the publisher. Both the publisher and the prisoner receive a rejection notice describing the "reasons" for the warden's action and a reference to the "article or material considered to be objectionable." 28 C.F.R. §540.71(d) (P.A. 23a). If either the prisoner or publisher objects to the decision, an administrative appeal may be pursued through the Bureau of Prisons from the warden to the Regional Director to the General Counsel. 28 C.F.R. §540.71(d) (P.A. 23a) and §542.15.

In contrast to the censorship policy challenged in this action, the Bureau's rules for censorship of correspondence are relatively narrow and limited. Incoming letters are screened to determine if they contain "escape plots," "plans to commit illegal activities or to violate institutional rules," "direction of an inmate's business," material written in code, or matter that "is nonmailable under law or postal regulations." (J.L. 105). Otherwise, they are forwarded to the prisoner. Unlike books or magazines, correspondence may not be censored merely because the warden deems it "detrimental to security, good order, or discipline." Indeed, many of the censored items involved in this case could not have been banned if their contents had been contained in a letter to a prisoner.

B. The Censorship Rule In Practice

1. The Absence of Meaningful Standards

A book or publication mailed to a prisoner is delivered to the prison mailroom. The initial screening of these materials is cursory. (Jt.A. 96). If the mailroom personnel do not flag

a book or publication for further review, it is delivered to the prisoner. (Jt.A. 95-96). If the publication or book is flagged as possibly objectionable, it is referred to another employee for review. (Jt.A. 95-97).⁴ That review is also cursory, typically taking only seconds or minutes. (Witkowski Dep. 11-12). Neither mailroom personnel nor the reviewing staff receive any formal training in applying the Bureau's censorship policy. (Spidle Dep. 72-73; Nave Dep. 76; Hanberry Dep. 14; Fenton Dep. 85-86, 142; Witkowski Dep. 4-5).⁵ Thus the staff have little to rely on except their own personal views as to which publications are acceptable. (Nave Dep. 87, 98, 102). One mailroom worker at Lewisburg candidly admitted that she did not know what the censorship standard meant. (Spidle Dep. 65, 72-73). When asked to explain the basis for her recommendations as to which publications were questionable, she explained:

Sex is a standard, radical is a standard. I will go out on a limb and say communism and fascism is a standard I would use. It is more of a political-sexual type standard I personally use. I have not been told.

(Jt.A. 97-98). Similarly, a supervisor of education stated that his recommendations to censor sexual material were based on "personal opinion." (Nave Dep. 87, 98, 102).⁶ One prison

⁴At some prisons, the mailroom employees review magazines, but not books, for content. This means that at those prisons, all books mailed by publishers to prisoners are permitted regardless of content, while magazines are nevertheless subject to censorship. (Jt.A. 77-78).

⁵The extent of the training is revealed by one warden's comment, "if [the mailroom worker] has any brains at all, he's supposed to know if something is going to cause problems." (Fenton Dep. 86).

⁶This employee believed that sexually explicit magazines should be censored only if they contained depictions of sex "gadgets." (Nave Dep. 101-103). Other employees expressed differing views which they were permitted to use as a basis for censorship. The Atlanta warden, for ex-

ensor admitted that he would no longer reject the same publication he had censored previously because of his own changing state of mind. He said:

Each day that I work within the Bureau of Prisons I hope that I continue to grow...if I don't and I stagnate, then I probably will reject everything . . . Through the growing process, things that two years ago I would reject, today I would not reject.

(Jt.A. 111).

Not surprisingly, censorship decisions vary wildly, both between prisons, and within the same prison. This is particularly true for publications criticizing prisons and prison administrators. For example, an issue of *The Call*, a leftwing political newspaper, was censored by prison officials at Marion because it contained an article critical of the prison's "control unit." (J.L. 7). When questioned about that decision in a deposition, the warden at Marion stated, "I don't see anything in that article that is not pretty well general knowledge. So as of today, I would let it in." (Jt.A. 102-103). While the warden at Marion did not have a problem with the article, the warden at Atlanta did. (Hanberry Dep. 91-92). This inconsistency extends to the highest levels of the Bureau. Thus, the Bureau's General Counsel supported the censorship decision. (Cripe Dep. II 112-114; T. 1454-1455). By contrast, a Regional Director and the Director would have allowed the disputed issue into the prison. (Jt.A. 89; 68). More generally, *The Call* is routinely read by prisoners at Lewisburg without apparent problems. (Jt.A. 99).

The inconsistencies inherent in the Bureau's censorship scheme are also revealed in the different reactions of various

ample, felt that all publications depicting sex acts should be excluded. (Hanberry Dep. 77-80).

prison officials to *The David Kopay Story* (Bantam Books, 1977) (Respondents' Lodging; P. Exh. 83). This book, was rejected from Atlanta "because the homosexual nature of the book was not in the best interest of the orderly running of the institution." (Jt.A. 117). It was also rejected from Marion because "[it]...is used to entice and propagate the gay movement. This movement causes problems in the institution." (Jt.A. 116). However, during his deposition for this case, the warden at Marion acknowledged that he "didn't think it would cause . . . any threat to security...I saw it as no threat. There were no pictures in it. It was strictly a story." (Jt.A. 102). It was later allowed into Marion without any apparent problem. (Jt.A. 106). It was also allowed into three other maximum security prisons — Terre Haute, McNeil Island, and Leavenworth. (Jt.A. 116-117). Furthermore, the General Counsel of the Bureau acknowledged that the book did not present a "facial reason" for exclusion. (Cripe Dep. II 54-55). Nevertheless, the Regional Director for the Southwest Region said he would continue to affirm its rejection from Atlanta.⁷ (McCune Dep. 47; Jt.A. 117-118).

Censorship of sexually explicit publications is treated in a similarly inconsistent fashion. In the Southeast Region, issues of *Hustler* magazine were censored from institutions ranging from maximum to minimum security. (P.Exh. 75-81; Jt.A. 53-55). During the same time period, in the North Central Region, *Hustler* was routinely read by subscribers at all prisons within that region, also ranging from minimum to maximum security without any apparent problems. (Jt.A. 60). Moreover, the magazine is sold in the prison commissary at Marion, the

⁷No evidence was introduced that the book was a threat to security or that it led to any problems at the institutions where it was permitted. The district court did not make any findings to justify censorship of this publication.

Bureau's highest security prison. (Wilkinson Dep. 17-18; Williams Dep. 101; T.1136).

One of the Regional Directors acknowledged the inconsistencies fostered by the Bureau's policy:

I do feel that all institutions should have the same general policy to allow the same type of publications in the institution. At the present time some institutions allow the *Advocate*, the "gay" newspaper, to come in. Then the inmate is transferred to another institution, such as Terre Haute, which does not allow that publication as it is in violation of our present policy statement...[I]t is my feeling [that] we should have a united effort on the part of all institutions to come up with guidelines to allow the same publications in all institutions.

(P.Exh. 12) [admitted into evidence T.329].⁸

2. "Boilerplate" Statements of "Reasons"

Once the decision is made to exclude a particular publication, a rejection notice is prepared for the warden's signature. The warden seldom reverses a staff member's recommendation for censorship. (Fenton Dep. 88-89; Witkowski Dep. 14). Indeed, the warden does not necessarily even read any of the articles in the publication. As one warden stated:

We don't read the articles. I'm not interested in articles and the mailroom isn't. They don't have time to read articles and I don't either.

⁸Prison officials at Atlanta reject all books and publications about electronics or amateur radio on the theory that such materials "present a threat to the good order, security, or discipline of the institution." (Jt.A. 130). Staff at other maximum security prisons take the contrary position and purchase those books for prisoner reading. (Adm. 6034).

(Jt.A. 77; *see* Williams Dep. 19).

While publications are not, by policy, rejected by title, in practice, some publications are repeatedly rejected issue after issue. (Jt.A. 113-116, 121, 123-128). The rejection notice typically consists of a pre-printed form containing boilerplate language with conclusory explanations. Thus, publications can be, and have been, rejected because they are:

- "inflammatory" (Jt.A. 113, 122);
- "glorify problem inmates" (J.L. 48; Jt.A. 113-114);
- "condone[] homosexuality" (Adm. 552);
- "present[] erroneous information" (Adm. 531; Witkowski Dep. 120-125, 130-131);
- promote "unity of inmates" (Adm. 902);
- "propagat[] (sic) an adversary attitude by inmates towards staff" (J.L. 46-48; *see also* J.L. 39);
- "glorify...homosexuals" (Adm. 784);
- "entice and propagate the gay movement" (Adm. 508, 674);
- contain "false and...irresponsible statements" (Adm. 740); or
- are "not suitable for release within this institution" (Adm. 949).

The district court found that reasons such as these "lack reference to the circumstances in the prison that support the warden's decision." (P.A. 33a). The Director of the Bureau agreed that the rejection notices should not utilize "boilerplate language" and should explain reasons for the rejection within the context of the institution. (T. 956-957, 982).⁹

⁹The district court found that security might be compromised if the "real reasons" were revealed. (P.A. 33a). This finding is unsupported by the record.

3. Pro Forma Administrative Appeals

The district court found that the failure of the rejection notices to provide the inmate and the publisher with the "real reasons" for the censorship could be remedied if the prisoner filed an administrative appeal since, in that event, "supplementary information" would be transmitted informally between the warden and the Regional Office or the General Counsel. (P.A. 33a). The record indicates to the contrary. A Regional Director who handles administrative appeals admitted that he "very rare[ly]" contacts the warden to check on local factors. (Henderson Dep. 24). The Bureau did not cite a single case in which censorship was justified by such "supplementary information."¹⁰ Censorship of a publication is "rarely" reversed on administrative appeal, which is basically a review of technical form. (Cripe Dep. I 48). The General Counsel gives "very heavy deference" to the warden's opinion, and will not substitute his judgment for the warden's as to whether a publication would pose a threat to security. (Cripe Dep. I 48, 28-29).¹¹

4. "All-or-Nothing" Rule

The Bureau defends the "all-or-nothing" rule — the practice of rejecting an entire book or magazine even if only one page or article is objectionable — on the ground that it does not want its employees to "laboriously" review each article in a publication. 44 Fed. Reg. 38258, col. 1-2, (June 29, 1979); (C.A. 76). The Director of the Bureau admitted that security

¹⁰In one year, for instance, the General Counsel consulted with local officials in approximately 13% of the appeals. (Cripe Dep. II 14-16).

¹¹The General Counsel engages in a "presumption of regularity" which means that if the warden asserts that the censorship is being done to further security, good order, or discipline, that decision will not be disturbed. (Cripe Dep. I 28-29, 48, 128).

was not the basis for the policy, noting that there would be no threat to security if the prisoner were given the option of having the offending pages deleted and then receiving the rest of the publication. (Jt.A. 68, 41, 100-101; see T. 167, 392-393, 452-453, 623-624).

5. Lack of Harm

The district court found that some publications "can present a security threat." (P.A. 31a). Respondents do not contest that general conclusion and agree that publications containing certain materials can be censored for valid security reasons. See e.g., n.3, *supra*. Throughout this fifteen-year litigation, however, petitioners have been unable to cite a single incident in which a threat to security was linked to a publication received by a federal prisoner.¹² John Conrad, the Bureau's former Director of Research, explained:

. . . [P]ublications have — from a vast amount of experience that has accumulated in operating correctional institutions — publications have very little influence, if any, in actions prejudicial to discipline. And consequently I would prefer to have a very limited list of prohibitions.

(Jt.A. 26). The petitioners' only outside corrections expert acknowledged that he, too, knew of no instance in which an article in a publication read by a prisoner resulted in an adverse incident. (T. 1251.16).¹³

¹²Witkowski Dep. 114, 121-122, 163; Hanberry Dep. 77-78, 94; Todd Dep. 7-8, 26, 32, 37, 45; Williams Dep. 68-70, 140; T. 1054, 1062-1063; Benson Dep. 36-37.

¹³A former official of the Bureau acknowledged that there was a positive impact in the prisons from the introduction of sexually explicit magazines. (Day Dep. 108-109).

C. Proceedings Below

The district court rejected a facial attack on the regulations, upholding them as necessary to prevent prisoners from reading "potentially disruptive" materials. (P.A. 31a). The rejection of the 46 specific items was upheld *en masse*, without a finding that any of the censored reading matter posed a threat to security if read by prisoners. (P.A. 30a-31a). Indeed, no such finding would have been possible on the record in this case, as indicated by an illustrative list of censored publications.¹⁴

¹⁴(1) *WIN Magazine*, a pacifist political periodical (J.L. 52-88), was rejected from Leavenworth on the ground that one article about the Bureau's prison industries program "depicts, describes, or encourages activities which may lead to use of physical violence or group disruption." (J.L. 52). The Regional Director acknowledged at trial that although the article was "critical" of the Federal Prison Industries program, that "in itself" was not enough to censor it, and therefore the publication should be allowed into all federal prisons in the region, including Marion, Terre Haute, and Leavenworth. (Jt.A. 61-62). The district court made no findings with regard to the censorship of this concededly unobjectionable publication.

(2) *The 1979 Peace Calendar: While There is a Soul in Prison* (P. Exh. 29; J.L. 22-36 [excerpts]) was censored at Atlanta on the ground that "it encourages prison strikes." (J.L. 21). The district court stated simply that the *Peace Calendar* contained a "rather intellectual set of 'statements on the prison experience'." (P.A. 29a, n.5). The court did not make a finding that the calendar presented a threat to security or otherwise explain why its censorship was permitted.

(3) *The Guardian*, a leftwing political newspaper (J.L. 37-38), was rejected from Marion because the publication "promoted the formation of prisoner unions and promotes an adversary attitude toward staff." (Jt.A. 118-119). The censorship was upheld on appeal. (J.L. 39). The employees who censored it testified that, in fact, it was not detrimental to security. (Jt. A. 106, 71-72). The district court failed to make any findings justifying the censorship of this publication.

(4) *The Labyrinth*, a leftwing prisoner-oriented periodical (J.L. 13-20), was censored from Atlanta because it was "inflammatory" (Jt. A. 122), and from Marion because it contained an article critical of prison medical

The district court accepted the proposition that prison wardens are entitled to "wide discretion" in content-based censorship pursuant to a "generalized" regulation and, in effect, that those decisions are not subject to judicial review.

care entitled "Medical Murder." (Jt.A. 123). The article reported two deaths in federal prisons and two in a state prison, and concluded that the prisoners, although sentenced to terms, were "in fact sentenced to death and [were] *murdered by neglect*." (original emphasis). Many of the allegations in this article are set out, for any prisoner who uses the prison law library, in *Green v. Carlson*, 581 F.2d 669, 670-671 (7th Cir. 1978), and *Carlson v. Green*, 446 U.S. 14, 16 n.1 (1980); see also *Green v. Carlson*, 826 F.2d 647, 653-654 (7th Cir. 1987) (dissenting opinion). The rejection notice stated that "this type of philosophy could guide inmates in this institution into situations which could cause themselves and other inmates problems with the medical staff." (J.L. 12; Jt.A. 123). The warden at Marion later testified that he disagreed with the censorship of this publication (Jt.A. 104), and the Regional Director also testified that the issue was acceptable. (Henderson Dep. 74-76). It was also acceptable at Lewisburg. (Jt.A. 92; see also Jt.A. 7-8). The district court made no finding about this publication nor did it otherwise explain why its censorship was justified.

(5) *Workers World*, a weekly newspaper of the Workers World Party (J.L. 89-91), was censored on the ground that it "supports the gay rights of inmates and rebellion and boycotting by inmates as a legitimate means of achieving goals." (J.L. 92; Jt.A. 126-127). The General Counsel, who had affirmed this censorship on appeal, acknowledged in a deposition that there was nothing in the publication that supported the reasons given for its censorship, and there was no portion of it that he could identify as objectionable. (Cripe Dep. II 95-96; Jt.A. 72). The district court did not make a finding that this newspaper was a threat to prison security or otherwise make any findings about this publication.

(6) Numerous issues of *The Militant* were rejected from Atlanta, Terre Haute, and Marion. (Jt.A. 123-124). Those rejections were upheld by the Regional Director. (Jt.A. 123). Later, as a result of an out-of-court settlement of a lawsuit brought by the publisher, the censorship decisions were reversed. The Regional Director changed his position and admitted that the censored issues did not contain any articles "detrimental to security..." (J.L. 43-45; Jt.A. 124-125). The district court made no findings justifying the censorship of any of those issues.

(P.A. 31a-32a). The court also upheld the "all-or-nothing" rule. The court stated, without record support (*see* II.B., *infra*), that the alternative practice of deleting only the objectionable material at the prisoner's request would cause "prisoner discontent." (P.A. 34a). The district court purportedly based its conclusions on *Pell v. Procunier*, 417 U.S. 817 (1974), but did not explain how it applied *Pell* to reach its conclusions. (P.A. 46a-47a).

On appeal, the District of Columbia Circuit initially addressed the appropriate standard of review. Noting that this case involved a claim of content-based discrimination affecting the First Amendment rights of nonprisoners, as well as prisoners, the circuit court declined to consider this as a "pure" prisoners' rights case. On that basis, it distinguished this Court's recent decision in *Turner v. Safley*, ____ U.S. ____, 107 S.Ct. 2254 (1987), and the earlier precedents on which *Turner* was based. *See e.g.*, *Pell v. Procunier*, *supra*; *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); and *Bell v. Wolfish*, 441 U.S. 520 (1979). Instead, the Court held that restraints on the ability of prisoners and nonprisoners to communicate with each other must be judged according to the standard articulated in *Procunier v. Martinez*.

Applying *Martinez* to the facial validity of the regulations, the court of appeals concluded that *Martinez* required "a causal nexus between expression and proscribed conduct" and therefore held that if publications were found to "encourage" violence or other breaches of security, the regulation "could survive the *Martinez* test." (P.A. 14a). At the same time, the court determined that regulations banning material that was deemed "detrimental to security, good order, or discipline," that "might facilitate criminal activity," or that merely "depicts," "describes," or "instructs in" prohibited activities, "permit[ted] a far looser causal nexus" than *Mar-*

tinez would allow. (P.A. 15a-16a). The Court also held that the practice of rejecting an entire publication when only a portion was deemed objectionable, failed to meet the overbreadth portion of the *Martinez* test. (P.A. 17a).

In addition, the circuit court reversed the district court's decision to review the censored items as a group. "[T]he rejections should have been addressed individually and none upheld unless consistent with *Martinez*." (P.A. 20a-21a). Although it resisted this conclusion below, the Bureau now concedes that the court of appeals correctly remanded the case to the district court for individualized review of each publication under whatever standard of review this Court decides is appropriate. (Pet. Brief 30).¹⁵

SUMMARY OF ARGUMENT

This case presents a limited challenge to the Bureau of Prison's content-based and viewpoint-based censorship of books, magazines, and newspapers sent through the mail to individual federal prisoners.

Respondents do not dispute that some publications may be censored for valid security reasons — for example, those containing blueprints of a prison or instructions for the manufacture or use of drugs, keys, ammunition or weapons, or advocacy of violence that is likely to result in violence. Nor do respondents dispute the Bureau's right to impose reasonable time, place and manner restrictions on the receipt of publications. *See e.g.*, *Bell v. Wolfish*, 441 U.S. 520 (1979). There

¹⁵The court of appeals decided that because some of the censorship occurred as early as 1977, and there was evidence at the 1981 trial that the Bureau had changed its opinion as to at least some of the material, the district court should determine in the first instance "whether and to what extent [the] individual rejections are moot." (P.A. 21a).

also is no issue of prisoners' associational rights, the receipt of bulk mailings of publications for in-prison distribution, or any other issue of within-prison or prisoner-to-prisoner communication. See *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977) and *Turner v. Safley*, ____ U.S. ____, 107 S.Ct. 2254 (1987).

Rather, this case involves the right of prisoners to read books and periodicals, and the right of publishers to communicate with prisoners through their publications. In that sense, it is not a "prisoners' rights" case; it is a case involving a "consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners" but whose interests are "inextricably meshed" with their subscribers who are prisoners. *Procunier v. Martinez*, 416 U.S. 396, 409 (1974).

Viewed in its proper context, this case is controlled by the holding in *Martinez*, that prison censorship "must further an important or substantial governmental interest unrelated to the suppression of expression," and that "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." 416 U.S. at 413. The "reasonableness standard" articulated most recently in *Turner* is not applicable because the First Amendment rights of non-prisoners are at stake.

Contrary to petitioners' claim, *Martinez* does not impose "strict scrutiny" on prison decisions. The *Martinez* Court carefully charted a middle course between the strict scrutiny standard used in First Amendment cases outside the prison context, and the completely deferential, "hands-off posture" adopted by some lower courts in early prison cases. In making this choice, the Court recognized the significant First

Amendment interests of civilians in corresponding with prisoners.

This case involves an equally weighty civilian interest: freedom of the press. The Bureau's argument that publications sent to prisoners deserve less First Amendment protection than letters stands the First Amendment on its head and ignores the place of press freedom in our constitutional order. Moreover, the in-prison activity that is contemplated — i.e. reading one's mail — is substantially the same whether the mail consists of letters or newspapers. In view of these similarities, the *Martinez* standard is fully applicable, as most federal courts have held both before and after *Turner*.

The *Martinez* test gives proper weight to the judgments of prison staff by recognizing the government's legitimate interests in security, order and rehabilitation. Prison officials are not required to show "with certainty" that adverse consequences would flow from the failure to censor. *Martinez* also recognizes the exigencies of the prison environment by giving prison officials the extraordinary authority of imposing a prior restraint without affirmatively seeking judicial review; the burden of seeking review remains with the prisoner or publisher. Compare, *Freedman v. Maryland*, 380 U.S. 51 (1965); *City of Lakewood v. Plain Dealer Publishing Co.*, 56 U.S.L.W. 4611 (June 17, 1988). Experience in the lower courts shows that the *Martinez* standard is quite capable of distinguishing between cases in which censorship serves a legitimate purpose and those in which it amounts to an imposition of the censor's personal views.

The *Martinez* test is also applicable to this case because the Bureau's censorship scheme, like the censorship rules in *Martinez*, is neither content-neutral nor viewpoint-neutral. On their face, the regulations call for content-based review of publica-

tions; in practice, the materials are censored because they present viewpoints that are unorthodox, unpopular, and usually are critical of prison officials and other governmental authorities. Such content-based censorship has always been subjected to close scrutiny by this Court. To permit official censorship on no more than a showing of "reasonableness" would provide insufficient protection to the First Amendment interests involved.

Petitioners cannot avoid the *Martinez* test by labeling prisons as a "nonpublic forum" subject only to a reasonableness standard. The prisoners here seek only to read their mail, not to assemble, picket, organize, or make speeches. Likewise, respondents do not seek access to some specialized service or forum, such as an internal mail or message system or a newspaper produced in the prison. The Court's nonpublic forum cases, therefore, have no applicability. Even if they did, the prerequisites for applying a reasonableness standard are absent from this case: the censorship scheme is not viewpoint-neutral, there are no alternative channels for communication of the censored material, and reading books and periodicals is not "basically incompatible with the normal activity" of a prison. *Grayned v. Rockford*, 408 U.S. 104, 116 (1972).

The Bureau's censorship scheme displays many of the same evils condemned in *Martinez*. The regulations fail to spell out explicitly the types of materials that are prohibited. In particular, the catchall "standard" allowing a warden to ban material he deems "detrimental to security, good order or discipline...or [that] might facilitate criminal activity" has been used, as in *Martinez*, to "eliminate unflattering or unwelcome opinions" and "to apply [the censor's] own personal prejudices and opinions..." 416 U.S. at 413-415. Using this standard Bureau staff have censored books and periodicals that they now acknowledge did not threaten prison security.

The censorship scheme, as applied, also fails to provide adequate reasons for particular censorship decisions. The publications are typically condemned because they are "inflammatory," or "present[] erroneous information," or express a disagreeable "philosophy." What is most often lacking is any information about exactly what in the publication is objectionable. As this Court has often noted in reviewing licensing schemes, reasonable specificity is required to "ensure constitutional decision-making . . . [and] provide a solid foundation for eventual judicial review." *City of Lakewood*, 56 U.S.L.W. at 4617. The court of appeals correctly found that the conclusory reasons provided by petitioners in this case did not "constitute[] a reasoned determination that the material encouraged [threatening] conduct..." (P.A. 20a).

The Bureau's "all or nothing" rule, under which a periodical is rejected in its entirety if any portion is objectionable, is similarly overbroad. The district court erred in stating that the practice was justified by a security concern that the alternative of deleting the objectionable portions and permitting the prisoner to read the rest would create more "discontent." The Director of the Bureau disavowed any security objection to deleting the offending portion and permitting the prisoner to read the rest. In light of that concession, the court of appeals correctly found that the restriction was not "generally necessary" to protect any legitimate governmental interest.

The final error committed by the district court was its failure to exercise judicial review over individual censorship decisions. It upheld the censorship policies, and then in one sweeping stroke sustained the censorship of all the books and publications without making a finding that any of the specific items posed a threat to prison security. The failure to make individualized findings violated a settled principle of First Amendment jurisprudence. A court must make an independent,

judicial judgment as to each censored item. *Jacobellis v. State of Ohio*, 378 U.S. (1964). The Bureau now belatedly acknowledges that the court of appeals correctly remanded the case to the district court for an individualized ruling on the censorship of each publication. (Pet. Brief 30).

ARGUMENT

I. *PROCUNIER V. MARTINEZ* PROVIDES THE APPROPRIATE STANDARD OF REVIEW IN THIS CASE.

A. Unlike *Turner v. Safley* This Case Involves Freedom Of The Press And Therefore The First Amendment Rights Of Nonprisoners.

This is not a “prisoners’ rights” case. This case involves the rights of nonprisoners-publishers — to engage in written communication through the mail with individual subscribers in federal prisons. Because the rights of specific publishers are “inextricably meshed” with the rights of their prisoner subscribers, this case should be governed by the standard of review set forth in *Martinez*, and not the reasonableness test of *Turner*.

1. *Procunier v. Martinez* Has Continuing Vitality

In *Turner*, the Court held that prison regulations may be upheld under a reasonableness test notwithstanding their impact on the constitutional rights of prison inmates. 107 S.Ct. 2254 (1987). That holding did not, however, overrule this court’s decision in *Martinez*. To the contrary, the *Turner* Court affirmatively cited *Martinez*, noting that *Martinez* struck down a “content-based regulation on the First Amendment rights

of those who are not prisoners.” *Id.* at 2260. (emphasis added). The Court specifically explained that:

Our holding [in *Martinez*] therefore turned on the fact that the challenged regulation caused a consequential restriction on the First and Fourteenth Amendment rights of those who are *not* prisoners.

When this Court analyzed the restriction on prisoner-to-prisoner correspondence at issue in *Turner* it applied a reasonableness test since the regulation in question exclusively affected the rights of inmates. However, when evaluating the restriction on inmate marriages, also challenged in *Turner*, the Court’s approach was different. Writing for a unanimous Court on this point, Justice O’Connor noted that the regulation impinged on the rights of civilians, and therefore “[a]lthough not urged by respondents, this implication of the interests of nonprisoners may support application of the *Martinez* standard.” *Id.* at 2266. Ultimately, the Court did not decide that question because the marriage regulation could not withstand scrutiny even under the reasonable relationship test.

Martinez therefore has continuing vitality and provides the appropriate standard of review where a content-based prison regulation works a “consequential restriction” on the First Amendment rights of nonprisoners who seek to engage in individualized written communication with prisoners.

2. Publishers Have Important Interests At Stake

Petitioners assert that a publisher does not have a “particularized interest” in communicating with a prisoner. (Pet. Brief 21). This claim is both irrelevant and incorrect.

This Court has never cited the alleged absence of such an interest on the part of a publisher or bookseller as justifying

a restriction on press freedom or free speech rights.¹⁶ More generally, the Court has rejected the notion that the importance of speech and the degree of its constitutional protection are determined by the identity of the sender or the source of the communication. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 at 777, 785 (1978). Thus, if a nonprisoner correspondent has a constitutionally protected interest "against unjustified governmental interference with the intended communication," *Martinez*, 416 U.S. at 409, so too does a publisher.¹⁷

In addition to being legally irrelevant, Petitioners' argument is wrong on the facts. Each of the publishers has received an individual order or subscription from a prisoner and seeks to communicate its written message (usually on a matter of public affairs) to the intended recipient. Therefore, like the correspondents in *Martinez*, the publishers here have interests that are "inextricably meshed" with those of their prisoner subscribers. 416 U.S. at 409.

¹⁶The Court's observation in *Martinez* that "[d]ifferent considerations may come into play in the case of mass mailings," 416 U.S. at 408, n.11, has little relevance here. The filling of individual subscriptions and orders by publishers is not properly characterized as a "mass mailing."

Moreover, the term "mass mailing" is more akin to the "bulk mailings" at issue in *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 130-131 and nn.7-8. In *Jones*, the prisoners sought to receive prisoners' union publications in bundles for in-prison redistribution in connection with organizational and associational activities. In upholding a prohibition on such bulk mailings, the *Jones* Court was careful to note that "individual mailings to individual inmates" were permitted. *Id.* at n.8. Respondents here do not seek the right to send or receive bulk mailings of publications.

¹⁷Indeed, *Martinez* itself did not distinguish among types of civilian correspondents; its standard applies equally to family members, lifelong friends, strangers, recently acquired "pen pals," and organizations that correspond with prisoners for humanitarian reasons.

It would stand the First Amendment on its head to argue that it affords fewer protections to the press than to private correspondents. The history of the First Amendment makes it clear that the Founders' primary concern was to abolish restrictions on public discourse, with particular reference to newspapers and other publications addressing political and social issues of public concern.¹⁸ See generally, Z. Chafee, *Free Speech in the United States* at 18-20 (1941).

Furthermore, it is now beyond dispute that the First Amendment protects not only the right "to distribute literature" but also "the right to receive it." *Martin v. Struthers*, 319 U.S. 141, 143 (1943); accord, *Bantam Books v. Sullivan*, 372 U.S. 58, 64 n.6 (1963); *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J. concurring); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Board of Education, Island Trees Union School District No. 26 v. Pico*, 457 U.S. 853, 912 (1982) (Rehnquist, J., dissenting).

To claim that a publisher has less "at stake" (Pet. Brief 13) than an individual correspondent when its audience is restricted by government edict simply ignores the "special

¹⁸As the Court has stated: "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . The Constitution specifically selected the press, which includes not only newspapers, books and magazines, but also humble leaflets and circulars (citations omitted)...to play an important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966). See *Hustler Magazine v. Falwell*, ___ U.S. ___, 108 S.Ct. 876, 879 (1988).

Most of the censored materials in this case involve matters of public affairs. Many are critical of the criminal justice and penal systems, see *The Guardian* [political newspaper (J.L. 37)] or *The Labyrinth* [magazine critical of prison administration and prison medical care (J.L. 13-20)], or discuss controversial views on social matters. See *The David Kopay Story*, autobiography of a homosexual football player. (Respondents' Lodging; P. Exh. 83).

and constitutionally recognized role [of the press].” *Bellotti*, 435 U.S. at 781. This Court has never upheld a prohibition or limitation on speech because it only affected part of the audience for the speech. For example, it would not have helped the State of Maryland in defending its film censorship practices to have argued that the film could still be distributed in 49 other states and the rest of the world. See *Freedman v. Maryland*, 380 U.S. 51 (1965) (film review board); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (protecting right of individual addressee to receive a publication).

Thus, the Bureau’s argument that censorship has “merely” an “incidental impact” on the press (Pet. Brief 13) is based on a false premise that subscribers are a fungible commodity. It implies that a publisher does not have a constitutionally protected interest in communicating with each individual subscriber. In a constitutional system designed to protect *individual* rights, it is hardly surprising that petitioners have been unable to point to a single decision in support of their novel interpretation of the First Amendment. See *Brooks v. Seiter*, 779 F.2d 1177, 1180-1181 (6th Cir. 1985).

Moreover, petitioners’ distinction between publishers and correspondents does not withstand scrutiny even on its own terms. A correspondent barred from writing to a prisoner could convey the communication to someone else who was not in prison as easily as a publisher could. Contrary to petitioners’ claim, if the communication were of a uniquely personal nature, the correspondent generally would have other alternatives available, including personal visits and telephone calls. See respectively 28 C.F.R. §§540.100 *et seq.*, and §§540.40 *et seq.* A publisher, on the other hand, has no other practical way of accomplishing the attempted communication with its prison subscriber.¹⁹

¹⁹*Pell v. Procunier*, 417 U.S. 817, 825-826 (1974) upheld the Bureau’s ban on face-to-face interviews between reporters and prisoners, relying

Given the “special” status of the press under our Constitution, and the far-reaching consequences of censorship on the press, it would be destructive of First Amendment freedoms to deny to publishers the same scrutiny of censorship decisions that is appropriately provided to other civilian members of the public under the *Martinez* test. Indeed, each of the nine other circuits that have considered this issue, whether before or after *Turner*, have concluded or assumed that *Martinez* supplies the controlling standard for content-based censorship of books, periodicals, and newspapers mailed to prisoners.²⁰

in part, upon the fact that alternative methods of communication were available, including correspondence.

²⁰The nine circuits are as follows: **First Circuit:** *Dooley v. Quick*, 598 F.Supp. 607 (D.R.I. 1984), aff’d 787 F.2d 579 (1986) (officials must follow *Martinez* guidelines); **Second Circuit:** *Morgan v. LaVallee*, 526 F.2d 221 (1975) (holding complaint sufficiently alleged violation of prisoner’s right to receive publication citing *Martinez*); **Fourth Circuit:** *Hopkins v. Collins*, 411 F.Supp. 831 (D.Md. 1976) aff’d in rel. part 548 F.2d 503 (1977) (striking down prison publication rejection under *Martinez*); **Fifth Circuit:** *Guajardo v. Estelle*, 580 F.2d 748 (1978) (follows *Martinez* in prohibiting prison officials from censoring publications critical of their penal philosophy and their activities); **Sixth Circuit:** *Brooks v. Seiter*, 779 F.2d 1177 (1985) (prisoners stated a claim under *Martinez* where officials prohibited them from receiving certain mail order publications); **Seventh Circuit:** *Aikens v. Jenkins*, 534 F.2d 751 (1976) (finding censorship regulations overbroad under *Martinez*); **Eighth Circuit:** *Valiant-Bey v. Morris*, 829 F.2d 1441 (1987) (utilizing *Martinez*, reversed dismissal of claim that religious publications were intercepted and confiscated by prison officials); *Murphy v. Missouri Department of Corrections*, 814 F.2d 1252 (1987) (finding prison mail policies that operated as a total ban on white supremacist material overly restrictive under *Martinez*); **Ninth Circuit:** *Pepperling v. Crist*, 678 F.2d 787 (1982) (follows *Martinez* in prohibiting prison officials from censoring publications critical of prison authorities); **Eleventh Circuit:** *Lawson v. Dugger*, 840 F.2d 781 (1987), reh. den. 840 F.2d 779 (1988) (striking down prison prohibition on the receipt of religious literature under *Martinez*), petition for *cert.* filed May 26, 1988, *Dugger v. Lawson*, #87-1994.

Petitioners cite *Mann v. Smith*, 796 F.2d 79 (5th Cir. 1986) and *Green v. Ferrell*, 801 F.2d 765 (5th Cir. 1986) as cases which apply a reasonable-

B. The *Martinez* Test Is A Balanced One That Requires A District Court To Consider The Government's Legitimate Interests In Prison Security, Order, Discipline, And Rehabilitation.

Petitioners claim that *Martinez* gives insufficient deference to the judgments of prison staff. By its own terms, however, *Martinez* charted a middle course between the strict scrutiny test used in a nonprison context, 416 U.S. at 406-407, and the completely deferential "hands-off" doctrine adopted by some lower courts in prison cases. *Id.* at 408.

Thus, *Martinez* specifically recognizes the "substantial governmental interests [in] security, order and rehabilitation." 416 U.S. at 413. It acknowledges that a prison official cannot be expected to predict "with certainty" the adverse consequences that are likely to flow from printed material. 416 U.S. at 414. And it grants prison wardens the extraordinary power of imposing a prior restraint on written expression. *Compare, Freedman v. Maryland*, 380 U.S. 51 (1965); *City of Lakewood*, 56 U.S.L.W. 4611 (1988). Accordingly, under *Martinez*, a warden may turn away a book or publication and place the burden of filing an appeal on the publisher or prisoner after the censorship has occurred. 416 U.S. at 417-419.

Recognizing the latitude afforded by the *Martinez* test, the Bureau itself endorsed the *Martinez* test during the trial of this case, urging its use by the district court in its Proposed

ness test. (Pet. Brief 27). Both of these jail cases are distinguishable. In both, the courts were faced with a blanket ban on the receipt and possession of published materials; in both, the regulation was defended on fire safety grounds, and the prevention of clogged plumbing. Citing *Bell v. Wolfish*, the regulations were struck down as an "exaggerated response." In neither case was the court of appeals faced with content-based censorship.

Findings of Fact and Conclusions of Law. (Jt.A. 133). In addition, the Justice Department has referred to *Martinez* as the governing law in challenges to state prison censorship rules. (P. Exh. 72) [admitted into evidence T. 1150Z].

Over the past fourteen years the lower federal courts have had extensive experience applying *Martinez* to prison censorship of publications. Contrary to the Petitioners' assertion, there simply is no evidence that application of *Martinez* has resulted in the entry of publications "that may lead to serious safety and security problems." (Pet. Brief 13). In fact, a survey of the recent case law indicates several instances in which courts have upheld prison censorship under the standards announced in *Martinez*.²¹

In *Vodicka v. Phelps*, 624 F.2d 569 (5th Cir. 1980), a regulation barring the reading by prisoners of publications that constituted an "immediate threat to the security of the institution" was upheld under *Martinez* both on its face and as applied to a newsletter that commented approvingly of a prior inmate work stoppage. *Id.* at 570-575. *Accord, Espinoza v.*

²¹Nonetheless, the Petitioners predict dire consequences for prison security from use of the *Martinez* standard, referring to four of the 46 publications and books as having a "potential for disruptive effect." (Pet. Brief 26). But the petitioners acknowledge that the question of the "perceived dangers presented by each" of the publications must "clearly" be resolved by the district court on remand. (Pet. Brief 30-31). At that point, the district court, applying *Martinez*, could decide to exclude one or more of these publications. Respondents' experts, for example, agreed that articles in two white supremacist publications might be censored under certain circumstances. (Jt.A. 12-13, 20-21, 27-28).

With regard to *Hustler* magazine, cited by the Bureau, as a security threat (Pet. Brief 26), it is noteworthy that that magazine is routinely received by federal prisoners in maximum security prisons, and even sold in the prison commissary at Marion without apparent problems. (Jt.A. 101; Wilkinson Dep. 10-11; Williams Dep. 101).

Wilson, 814 F.2d 1093 (6th Cir. 1987) (ban on reading of homosexual publication upheld on security grounds); *Travis v. Norris*, 805 F.2d 806 (8th Cir. 1986) (ban on publication entitled "Gorilla [sic] Law" upheld because it advocated violence); *Carpenter v. State of South Dakota*, 536 F.2d 759 (8th Cir. 1976) (exclusion of sexually explicit material). See also *Meadows v. Hopkins*, 713 F.2d 206 (6th Cir. 1983) (upholding regulations under *Martinez*). It is apparent therefore, that, contrary to the Bureau's claim, *Martinez* does not create an "insurmountable" burden for prison administrators. (Pet. Brief 13).

C. This Case Involves The Sort Of Content-Based Judgments That Have Always Triggered The Court's Close Scrutiny To Ensure That Subjective Opinions Are Not Utilized To Suppress Unwelcome Criticism.

In sustaining the restriction on prisoner-to-prisoner correspondence, this Court in *Turner* emphasized that the regulation was "content-neutral" both on its face and as applied:

We have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion without regard to the content of the expression. . . .

____ U.S. _____. 107 S.Ct. at 2262.

Similarly, in *Pell v. Procunier* the Court emphasized that the rule limiting face-to-face interviews between reporters and inmates was applied in a "neutral fashion" and "no discrimination in terms of content is involved." 417 U.S. at 828. And in *Bell v. Wolfish*, when the Court upheld a ban on hardcover books unless they were mailed directly from a publisher, bookstore or bookclub, the Court noted that the rule operated

in "a neutral fashion, without regard to the content of the expression." 441 U.S. at 551.

These holdings are consistent with the oft-expressed principle that restrictions on expression are most likely to be upheld "...provided that they are justified without reference to the content of the regulated speech" *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

In this case, the Petitioners concede that its policy is not content-neutral. (Pet. Brief in Court of Appeals 43). No other conclusion is possible. By its own terms, the policy requires a case-by-case evaluation of the content of each publication and an assessment of the predicted impact of that publication in prison security. See *Boos v. Barry*, ____ U.S. ____, 108 S.Ct. 1157, 1164 (1988).

Even in a prison context, there is a need for "sensitive tools" to achieve a system of regulation that avoids suppressing speech "...because of disagreement with the message." *Clark, supra*, at 295. The standard of review that best satisfies that need in this case is the one enunciated in *Martinez*. Faced in *Martinez* with a "content-based regulation on the First Amendment rights of those who are not prisoners," *Turner* at 2260, this Court applied mid-level scrutiny to safeguard those rights by requiring that the restrictions be "necessary" or "essential" to further a legitimate governmental interest unrelated to the suppression of expression. *Id.* at 2258. Thus, the *Martinez* standard recognizes that deference to the judgment of prison officials cannot be absolute. Where the free speech rights of outsiders are concerned, a prison official's discretion must be limited by the need to protect those interests. This is because prison administrators, by virtue of their role, tend not to think in constitutional terms. (Fenton Dep. 79). Accordingly, a decision to censor prison mail on the

basis of its content, whether it is personal correspondence or publications, requires that it be evaluated under an intermediate standard of review, in order to prevent idiosyncratic, personal, or arbitrary decisions.

D. The Bureau's Censorship Policy Cannot Be Justified By The Prison's Status As A Non-public Forum.

The Bureau claims that applying *Martinez* to publishers would be inconsistent with this Court's decisions involving expression in nonpublic forums and that the court of appeals "erroneously treated prisons as if they were public forums." (Pet. Brief 22).

We agree that a prison is a nonpublic forum. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977). But this Court's nonpublic forum decisions are not applicable here for four reasons. First, the relevant forum in this case is not the prison but the United States mail. Second, the Bureau's policy on its face and as applied is viewpoint-based. Third, there are no alternative channels available to a publisher to communicate its message to a particular subscriber if the publication is censored. Finally, reading publications mailed individually to prisoners is an activity that is not "basically incompatible" with a prison environment.

1. This Is Not a Nonpublic Forum Case

The Court's "nonpublic forum" holdings are not applicable here because the relevant forum is not the prison but the mail. In defining a forum this Court looks to the "particular channel of communication...[it focuses] on the access sought by the speaker." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 801 (1985). Here the publisher re-

spondents seek only to mail their publications, and the prisoner respondents seek only to receive and to read their mail.

The mail is a traditional forum that is open to all.²²

The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues. . . .

Lamont v. Postmaster General, 381 U.S. 301, 305 (1965) quoting *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting) (footnote omitted). *Accord*, *Blount v. Rizzi*, 400 U.S. 410, 416 (1971).

By contrast, the Court's nonpublic forum cases involve more than the passive act of reading one's mail. Some of them involve restrictions on assembly, leafletting, and other face-to-face communications. Thus, in *Jones*, the activities being restricted consisted of "group activity. . . in the nature of a functioning organization," including solicitation, group meetings, and the receipt of "bulk mailing" of newsletters for redistribution inside the prison. *Jones*, *supra*, at 129-139. In *Greer v. Spock*, 424 U.S. 828 (1976) the Court upheld a ban on political meetings and leafletting on a military base.

In another line of nonpublic forum cases, the "forum" in question was a specialized service provided by government, such as an internal public mail system, *Perry Education Association v. Perry Local Educators' Association*, 460 U.S.

²²*United States Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114 (1981) is not to the contrary. There, the Court upheld statutory restrictions upon the placement of non-mailed matter in authorized postal depositories, but carefully noted, "We are . . . not confronted with a regulation which in any way restricts the appellees' right to use the mails." *Id.* at 127.

37 (1983), an in-house fund-raising drive aimed at federal employees, *Cornelius*, 473 U.S. 788 (1985), and a high school newspaper funded by school authorities and used for educational purposes. *Hazelwood School District v. Kuhlmeier*, ___ U.S. ___, 108 S.Ct. 562 (1988). No such service is at issue here.

If the prisoner-respondents sought to distribute publications to other prisoners as in *Jones*, or have meetings to discuss them, or read them aloud from a soapbox in the prison yard, the case would be different. It would also be different if they sought to challenge censorship of an in-prison newspaper.²³ But that is not this case. All respondents seek to do is read their mail. The fact that a prisoner resides in a prison and must receive mail there does not turn the mail into a nonpublic forum.

2. The Bureau's Regulations are Not Viewpoint Neutral

Even if this case were treated as a nonpublic forum case, petitioner's regulations do not pass muster because they are not viewpoint-neutral.

In general, access to a nonpublic forum may be regulated under a reasonableness standard as long as officials do not try to suppress expression because they disagree with it. *Perry*, 460 U.S. at 46. Reasonable subject matter distinctions may be made so long as they are viewpoint neutral, but even a facially reasonable restriction will not be upheld if it is "in reality a facade for viewpoint based discrimination." *Cornelius*, 473 U.S. at 811. Indeed, the "principle of viewpoint neutrality . . . underlies the First Amendment itself . . ." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984).

²³See *Pittman v. Hutto*, 594 F.2d 407 (4th Cir. 1979) (applying standard of *Jones*, to censorship of a prisoner-produced newspaper).

The undisputed evidence shows that Bureau officials utilize their discretion to suppress "unwelcome criticism," *Martinez* at 415, and unpopular or unconventional viewpoints. As one mailroom employee stated:

Sex is a standard, radical is a standard. I will go out on a limb and say communism and fascism is a standard I would use. It is more of a political-sexual type standard I personally use. I have not been told.

(Jt.A. 97-98). Bureau officials acknowledged that they screen and censor publications based on nothing more tangible than their own "personal opinion[s]." (Nave Dep. 87). Even the stated "reasons" for rejection indicate that prison staff often censor materials because they personally disagree with the viewpoint of the materials: e.g. "entice and propogate(sic) the gay movement" (Adm. 508, 674), "promotes an adversary attitude among inmates towards staff" (J.L. 39), "presents erroneous information" (Adm. 531; Witkowski Dep. 120-131), contains "allegations of police brutality" (Adm. 888), or contains "false and irresponsible statements." (Adm. 740).

Examination of the rejected materials reveals that they are highly critical of prison officials or other law enforcement or government authorities, c promote ideas not in conformity with conventional views. The excluded materials are not *Time*, *Newsweek* or *Readers' Digest* nor even *The New Republic* or *National Review*. They do include *Soledad Brother: The Prison Letters of George Jackson* (P.Exh. 16) [admitted into evidence T.329]; *The Call* (J.L. 6-11); *The 1979 Peace Calendar: While There is a Soul in Prison* (J.L. 22-36); *Workers World*, (J.L. 89-99); *Join Hands* (P.Exh. 22; C.A. 156-163).²⁴

²⁴The Bureau claims that its regulation is not "viewpoint based" because it "expressly provide[s]" (Pet. Brief 24), that the "warden may not reject a publication solely because its content is religious, philosophical, political, social or sexual or because its content is unpopular or repugnant."

Given the potential for viewpoint-based judgments inherent in this censorship policy, it is essential to scrutinize the regulation on its face *and as applied* to ensure that prison officials do not use their legitimate regulatory powers to "disapprove of . . . idea[s] for partisan or political reasons." *Board of Education, Island Trees Union School District No. 26 v. Pico*, 457 U.S. 853, 879 (Blackmun, J., concurring) (1982). The court below required nothing more.

3. Lack of Substantial Alternative Channels

In each of the other "forum" cases where this Court has upheld restrictions on expression, the plaintiff had "substantial alternative channels that remain[ed] open," for accomplishing the attempted communication. *See e.g., Perry*, 460 U.S. at 53; *Clark*, 468 U.S. at 295; *Cornelius*, 473 U.S. at 809. By contrast, if a publication is censored, there is no practical alternative means by which the publisher can transmit the censored information to the prisoner subscriber. Under these circumstances, the result cannot be described as a "reasonable time, place and manner" restriction; rather, it represents a total prohibition on communication.²⁵

4. Reading is Not "Basically Incompatible With The Normal Activity" of a Prison

Even if the Bureau's policy were viewpoint neutral, and an alternative means of communication existed, it still would not be a reasonable time, place and manner restriction. The issue in evaluating a complete prohibition of expression is whether

Of course, that does not completely bar a warden from considering a publication's viewpoint in making his censorship decisions.

²⁵As noted *supra*, a friend or family member with a personal message may convey it in a visit or a telephone call. This is not a practical option for most book or newspaper publishers.

there is some interest unrelated to speech that justifies this silencing. *See City of Lakewood*, 56 U.S.L.W. at 4615. To put it another way, the question is whether "the manner of expression is *basically incompatible* with the normal activity of a particular place at a particular time." *Grayned v. Rockford*, 408 U.S. 104, 116 (1972); *City of Lakewood*, *supra*, at 4615 (emphasis added).

While admittedly a prison is a nonpublic forum and not hospitable to associational rights, *see Jones, Pell, and Block v. Rutherford*, 468 U.S. 576 (1984), in *Martinez*, this Court, by extending broad protections to prisoner correspondence, acknowledged that the activity of reading is not inherently incompatible with that forum or with a person's status as a prisoner.

The Bureau's publications policy confirms the proposition that reading in prison is a positive activity with few accompanying security concerns. The Bureau policy allows an inmate to subscribe to and receive publications without prior approval by prison officials. 28 C.F.R. §540.70(a). The provision of prison libraries also indicates the Bureau's view that reading in prison generally is not an activity freighted with threats to security. The Petitioners note, ". . . with the exception of those specific publications that are determined to pose a danger to a particular institution at a particular time, *publishers are free to send their publications to federal inmates.*" (Pet. Brief 21, citing 28 C.F.R. §540.70(a) [emphasis added]). In contrast, face-to-face visits must be approved in advance by prison officials. 28 C.F.R. §540.51. This important difference reflects the far more sensitive security concerns posed by face-to-face visiting, a crucial distinction noted by this Court in justifying enhanced deference to prison officials on issues affecting associational rights. *Pell*, 417 U.S. at 826. The fact that the vast majority of publications currently are

being allowed into federal prisons (Pet. Brief 26, n.11), underscores the basic compatibility of reading with the prison environment.

Because the passive activity of reading individually mailed material, whether it is personal correspondence or periodicals, is not "basically incompatible" with the "activity of a prison," the Bureau's regulations and particular censorship decisions should be evaluated with at least the same degree of scrutiny applied to correspondence from civilians, the rule of *Martinez*.

E. Analysis of This Court's Prison Cases Supports Application of the *Martinez* Test.

The Bureau claims that this Court's post-*Martinez* decisions "refute the court of appeals' apparent assumption that an impact on outsiders, however indirect, triggers strict scrutiny review." (Pet. Brief at 21). This misstates respondents' claims and the court of appeals' decision.²⁶

The Petitioners argue that *Block v. Rutherford*, 468 U.S. 576 (1984), *Pell*, and *O'Lone v. Estate of Shabazz*, ____ U.S. ____, 107 S.Ct. 2400 (1987), each of which used a "reasonable relationship" test, involved regulations that had an impact on outsiders. They fail to note, however, that in each of those cases the issue was the physical entry of outsiders into the prison, as compared with the reading of printed materials mailed by outside publishers. In *Pell*, the Court found this distinction to be decisive:

In *Procunier v. Martinez*, *supra* we could find no legitimate governmental interest to justify the substantial restrictions that had there been imposed on *written communication by inmates*. When, however,

²⁶We contend, as noted *supra*, at I.A.2, that the censorship regulation, as applied here, has a substantial, consequential impact on nonprisoners.

the question involves the *entry of people into prisons for face-to-face communication* with inmates, it is obvious that institutional considerations, such as security and related administrative problems . . . require that some limitations be placed on such visitations.

417 U.S. at 826 (emphasis added).

Petitioners also argue that the court of appeals distinction between "expression of ideas on paper" and "conduct qua expression" finds no support in this Court's decisions, claiming that several post-*Martinez* decisions using a "reasonable relationship" test also dealt with restrictions involving "expression of ideas on paper." (Pet. Cert. Brief 13). But none of those post-*Martinez* cases — *Turner*, *Bell* and *Jones* — dealt with content-based censorship of individually mailed written expressions from outsiders.

In *Turner*, the Court expressly noted that the restriction on prisoner-to-prisoner correspondence was a content-neutral rule. 107 S.Ct. at 2264. Similarly, *Bell v. Wolfish* upheld a content-neutral rule designed to limit the flow of contraband via incoming parcels. 441 U.S. at 551. The perceived danger stemmed not from the content of the writings but from the potential for the introduction of physical contraband secreted in the book itself. Finally, *Jones v. North Carolina Prisoners' Labor Union* dealt with a restriction on bulk mailings for later redistribution in the prison; the Court specifically noted that prisoners could continue to receive individually mailed copies of the Union's literature, 433 U.S. at 131, n.8. The Court also emphasized that the case did not concern "questions of the First Amendment rights of inmates or outsiders" since there was no issue before the Court of interference with "correspondence of outsiders and individual inmates." *Id.* Indeed, in *Jones* the Court specifically noted that ". . . First Amendment speech rights are barely implicated. . ." *Id.* at 130.

II. AS CONSTRUED BY THE DISTRICT COURT, THE *TURNER* STANDARD IS INADEQUATE TO PROTECT THE FIRST AMENDMENT INTERESTS AT STAKE IN THIS CASE.

Applying the reasonableness standard, the district court reached a decision that is inconsistent with settled First Amendment principles on at least three grounds. First, it upheld a censorship scheme that is vague, overbroad, and procedurally inadequate. Second, it permitted the Bureau to ban books and magazines in their entirety when the only articulated objection was to isolated passages or individual articles. Third, it failed in its duty to consider each censored item individually. For the reasons described more fully below, the court of appeals correctly rejected both the district court's reasoning and its result.²⁷

²⁷Respondents contend that the challenged policies and practices could not withstand examination even under a "reasonableness" standard. That is because they are not content-neutral, 107 U.S. at 2262; there are no alternative means of exercising the right available to inmates, and there is an "obvious, easy" alternative to the Bureau's vague and overbroad policies, namely, the more narrowly tailored policy governing correspondence, which fully accommodates the Bureau's security needs. (J.L. 105). Finally, the record clearly demonstrates that most of the specific censorship decisions were an "exaggerated response" to security concerns. *Id.* See Statement of the Case at Section B., *supra*.

A. The District Court Erroneously Upheld A Vague, Overbroad, And Procedurally Inadequate Censorship Scheme That "Fairly Invited Prison Officials To Apply Their Own Personal Prejudices and Opinions" And Led To The Censorship Of Materials Protected By The First Amendment.

1. The General Censorship Standard Is Vague and Overbroad

In upholding a regulation that provides a warden with open-ended discretion to reject any publication that he or she believes is "detrimental to security, good order or discipline . . . or might facilitate criminal activity," the district court endorsed a standard that contains some of the same flaws condemned in *Martinez*. The regulation struck down in *Martinez* allowed prison officials to reject correspondence if it contained "inflammatory political, racial, religious, or other views," and a catchall that allowed rejection of correspondence that was deemed "otherwise inappropriate." 416 U.S. at 415. Noting that the standard "fairly invited" prison officials "to apply their own personal prejudices and opinions as standards for censorship," *id.*, the Court found that such "broad restrictions" were unnecessary to further any governmental interest unrelated to the suppression of expression.²⁸

²⁸This Court has "long been sensitive to the special dangers inherent in a law placing unbridled discretion . . . in the hands of a governmental official," *City of Lakewood*, 56 U.S.L.W. at 4616. The Court has acknowledged that "express standards are needed," especially in the free speech area, to

provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it dif-

"Not surprisingly," the Court observed, wardens had used the wide discretion allowed by the regulations "to apply their own personal prejudices and opinions. . ." and that the regulations "invited" them ". . .to suppress unwelcome criticism. . ." 416 U.S. at 415.

The censorship policy challenged in this case allows prison officials the same type of "extraordinary latitude for discretion" decried in *Martinez* and has led to the same results. Bureau officials censor publications based on nothing more than their own opinions (Nave Dep. at 98, 87, 102), suppressing material because they think it presents "erroneous information" (Adm. 531; Witkowski Dep. 120-125, 130-131), contains "false and irresponsible statements" (Adm. 740), because they think it is "slanted" (Williams Dep. 121), because it "tends to raise issues which may or may not be true" (Carlson Dep. 75), or to improve a prisoner's "attitude or philosophy" (Williams Dep. 77-78). The Court need look no further than the Bureau's suppression of criticism of its medical care program,²⁹ and its prison industries program³⁰ to see that here, as in *Martinez*, prison officials "apply their own personal prejudices and opinions . . . [and] suppress unwelcome criticism." 416 U.S. at 415.³¹

ficult . . . to determine in any particular case whether the censor is permitting favorable, and suppressing unfavorable expression.

Id. at 4616 (1988).

²⁹See "Medical Murder" article in *Labyrinth* (J.L. 12, 18; Jt.A. 122-123); compare, *Green v. Carlson*, 581 F.2d 669, 670-71 (7th Cir. 1978), *aff'd*, *Carlson v. Green*, 446 U.S. 14 (1980).

³⁰See "Slave Labor in America's Prisons" (J.L. 54-58); Compare with J. Mitford, *Kind and Usual Punishment* at ch. 11 (1973).

³¹Prison censorship regulations virtually identical to the Bureau's have been held invalid by the lower courts. *Hopkins v. Collins*, 411 F.Supp. 831, (D. Md. 1976), *aff'd* in rel. part, *mod. on other grnds.*, 548 F.2d 503 (4th Cir. 1977); *Aikens v. Jenkins*, 534 F.2d 751, 757 (7th Cir. 1976).

2. The Illustrative Guidelines Are Also Vague and Overbroad

The illustrative guidelines in the policy do not cure the ambiguities and overbreadth of the general standard because the guidelines themselves are non-exhaustive, as well as vague and overbroad in their own right. Those guidelines were aptly described by the district court as a "generalized description of excludable publications" (P.A. 29a) that did not "appreciably limit" a warden's "wide discretion." (P.A. 31a). The district court nonetheless upheld them as "reasonable" under the *Pell* standard. *Id.*³²

The court of appeals reversed, in part, holding that the guidelines allowing censorship of reading material that merely "depict" or "describe" "fall short" of the requirement of *Martinez* that there be a "causal nexus" between the expression and proscribed conduct. (P.A. 16a).³³ The court of appeals was clearly correct. The first criterion — "depicts or . . . describes methods of escape. . ." — was acknowledged by Bureau staff to allow rejection of otherwise unobjectionable material. Thus, this criterion fails to distinguish between materials that might reasonably encourage a specific escape attempt and those that are general knowledge such as *Papillon*,³⁴ a book the Bureau conceded was not harmful, and yet, could have been censored under this standard. (Henderson Dep. 20-22; *see also* T. 150, 379, 437, 546, 611).

³²The district court did not rule expressly on each of respondents' claims of vagueness and overbreadth but held generally that the censorship system was "reasonable." (P.A. 32a).

³³The court of appeals sustained those portions of the guidelines that allowed exclusion of a publication if the warden found that it would "encourage" violence; "that regulation could survive the minimum *Martinez* test." (P.A. 14a). Respondents have not sought review of that holding.

³⁴This book is an autobiography containing detailed descriptions of successful escapes from various prisons including Devil's Island.

The second criterion — “depicts, or describes . . . activities which may lead to the use of physical violence or group disruption” — also is too broad. It was used, for example, to censor an issue of *WIN Magazine* that contained an article critical of the Leavenworth prison industries programs. (J.L. 54-58).³⁵ It could be used to justify censorship of graphic descriptions of crimes reported in daily newspapers if a warden asserted that they “describe activities” that “may lead” to “physical violence.” (See also, T. 151, 380-381, 611).

The third criterion — “instructs in the commission of criminal activity” — was acknowledged by prison officials to allow censorship of otherwise acceptable material such as Agatha Christie mysteries or newspaper stories that describe in detail the commission of a crime. (T. 1431; see T. 153).³⁶

3. The District Court Erroneously Upheld Vague And Conclusory ‘Reasons’ For Censorship

This Court has required a statement of reasons in many contexts where government deprives an individual of protected interests. *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) (imposition of prison discipline); *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972) (parole denial). In the First Amendment context, a statement of reasons is essential to “ensure constitutional decision making” and to provide a “solid foundation for eventual judicial review.” *City of Lakewood*, 56 U.S.L.W. at 4617.

A reasons requirement promotes thought by the decision maker, focuses attention on the relevant points and further protects against arbitrary and

³⁵At trial prison staff acknowledged that the publication was unobjectionable. (Jt.A. 61-62).

³⁶Several lower courts have invalidated similar criteria. *Aikens v. Jenkins*, 534 F.2d at 757; *Hopkins v. Collins*, 548 F.2d at 504; *Cofone v. Manson*, 409 F.Supp. 1033, 1040-1041 (D. Conn. 1976).

capricious decisions grounded upon impermissible or erroneous considerations.

Jackson v. Ward, 458 F.Supp 546 at 565 (W.D.N.Y. 1978) (paraphrased in part from *Dunlop v. Bachowski*, 421 U.S. 560 (1975)). Vague, general or conclusory statements are of little value for these purposes; a “degree of specificity” is required. *City of Lakewood*, *supra*, at 4617.

Bureau decisions to censor are justified in most cases by boilerplate “reasons” which convey little useful information. They are vague, overbroad and fail to establish the causal link to the legitimate governmental interests of security, good order and discipline required by *Martinez*. Some of these rote, conclusory reasons are:

— “inflammatory” (Jt.A. 113, 122);

— “glorify problem inmates” (Adm. 535-542; J.L. 46-48; Jt.A. 114);

— “have a tendency to develop an adversary attitude toward staff . . . this type of attitude is detrimental to the good orderly running of this institution.” (Adm. 578, 785, 802, 904; see J.L. 39);

— “This philosophy guides individual inmates into situations which can cause themselves and other inmates problems with the posted regulations of this institution. . .” (Jt.A. 125-127);

— “presents erroneous information” (Adm. 531).

A court (or a prison official) reviewing such statements of reasons would be at a loss to determine exactly what material was objected to, why it was objected to, or what untoward consequences were expected had the recipient been permitted to read the publication.³⁷

³⁷The district court, in its discussion of petitioners’ statement of reasons claim, missed a good part of the point. It acknowledged that many of the

In order to focus a censor's inquiry on the actual content of the publication and on whether its content falls into a category prohibited by a valid regulation, and to permit effective review in both administrative and judicial forums, the Court should require the Bureau to give a "brief statement of the reasons, in meaningful language, specifying the offending portion if less than the entire publication is objectionable." *Jackson v. Ward*, 458 F.Supp. at 565. "It is not enough that the rejection notice recite the applicable criterion." *Cofone v. Manson*, 409 F.Supp. at 1041, n.21. Rather, the notice must state with specificity what it is about the publication that is objectionable.³⁸

The court of appeals was correct, therefore, in finding that the explanations given did not provide "a reasoned determina-

statements "lack reference to the circumstances in the prison that support the warden's decision" and that the "failure to refer to institutional conditions makes the written decisions less easily reviewable." (P.A. 33a). But it upheld the statements because it felt it would be dangerous to tell the inmate the "real" reasons since that "could expose weaknesses in prison security to exploitation by inmates." *Id.*

In most cases, valid reasons for censorship will be based not on "circumstances in the prison" but on material in the *publication* that violates valid and narrowly drawn censorship regulations. If, for example, a publication contains information on how to pick locks or brew alcohol or advocates violence against prison staff or inmates, it is easy enough to say so, and abundantly clear from the material itself why the publication may be censored. Such matter is censorable regardless of "circumstances in the prison." The notion that censorship decisions generally are based on particular circumstances in particular prisons is unsupported by the record. Petitioners could not cite even a single case in which censorship was based on particular events or conditions at a particular prison. Clearly, censorship in the Bureau is based on the content of the publications; the wild variation in decisions between institutions (See Statement of the Case at Section B., *supra*), reflects variations in the censors' subjective views and not in prison conditions.

³⁸The Director of the Bureau admitted that the rejection notices should not utilize "boilerplate language." (T. 982).

tion that the material encouraged conduct which would constitute or otherwise was likely to produce, a breach of security or order or an impairment of rehabilitation." (P.A. 20a). The First Amendment requires no less.

B. The District Court Erroneously Upheld the "All-or-Nothing" Rule.

The court of appeals correctly held that the practice of rejecting an entire book or publication when the only objection was to a page or an article was not "generally necessary" to protect the legitimate "governmental interest involved in the portion properly rejected." (P.A. 16a). *Accord, Pepperling v. Crist*, 678 F.2d 787, 791 (9th Cir. 1982).

The district court stated, erroneously, that the Bureau defended this practice on security grounds. (P.A. 34a). The court upheld the practice as "reasonably related" to security because the alternative suggested by respondents' experts of deleting the offending material and providing the rest to the prisoner "would cause more discontent." *Id.* This conclusion is completely unsupported by the record.³⁹ In any event, deleting the offending portion would not increase discontent, because the prisoner could be given the option of having the entire publication rejected or receiving the unobjectionable portions. (See T. 167, 392-393, 452-453, 623-624). Indeed, Direc-

³⁹The Court stated that one of plaintiffs' experts concurred that deleting the objectionable material would "create more discontent than the current practice." (P.A. 34a). The Court apparently was referring to the testimony of John Conrad, the former Director of Research for the Bureau. (T. 393). Examination of the transcript indicates, however, that while Mr. Conrad did not "like" deleting the offending page or article he felt "that's the best of the bad solutions which are available. . . . But I don't see any way out of it. I'd rather do that than exclude the publication entirely just on the basis of one offending passage." *Id.* He did not in fact state that deleting the material would create more "discontent."

tor Carlson specifically admitted that there was no security risk presented by deleting the offending page or article and permitting the prisoner to read the rest.⁴⁰

In actuality, the Bureau's defense of the "all-or-nothing" rule rests on the familiar ground of administrative convenience. According to the Bureau, it is too burdensome to review "laboriously" each article in a publication. 44 Fed. Reg. 38258 col. 1-2 (June 29, 1979); (C.A. 76).⁴¹ The Petitioners' statistics do not bear out that claim. Current practice has led to censorship of fewer than 2000 items per year (Pet. Brief 26, n.11), or in other words, approximately one publication per week at each of the Bureau's 45 prison facilities; and this number should be substantially reduced by an appropriate narrowing of the censorship guidelines.⁴² (Jt.A. 41).

⁴⁰Jt.A. 68, 41; see Jt.A. 100-101. Plaintiffs' experts concurred. T.167, 392-393, 452-453, 623-624.

⁴¹This notion, that an article may be censored without even being read by the censor is, to our knowledge, unique in American jurisprudence.

⁴²Other large prison systems have not found it necessary to resort to an "all-or-nothing" rule. In New York State, for example, the relevant regulation provides that a prisoner may

[r]eceive the publication with the objectionable matter removed or blotted out. This option shall be available only if the objectionable portions of the publication constitute eight or fewer individual pages or if they constitute a single chapter, article or section of any length. This option need not be made available if the publication is in a form other than a book, magazine, or newspaper, and if removing or blotting out portions would present physical difficulties.

N.Y.S. Directive 4572 at 5 (reprinted in *Amicus* brief submitted by Correctional Association of New York). See also *Hernandez v. Estelle* 788 F.2d. 1154, 1157 (5th Cir. 1986) (describing Texas Department of Corrections' policy of "clipping" out offensive portions and delivering the remainder to prisoner; the policy was developed in response to *Guajardo v. Estelle*, 580 F.2d. 748, 761 (5th Cir. 1978) (only "portions" may be censored).

Even if true, petitioners' administrative convenience argument is entitled to little weight in a First Amendment context. As this Court noted in *Martinez*, an administrative regulation or practice touching on First Amendment rights of non-prisoners must be "narrowly drawn to reach only material that might be thought to encourage violence. . . . A restriction that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad." *Id.* at 413, 417.

In short, petitioners' practice of discarding an entire book or publication when only a small portion is objectionable represents the constitutional equivalent of "throwing out the baby with the bathwater."⁴³

C. The District Court Erroneously Declined To Exercise Judicial Review Over Individual Censorship Decisions.

The court of appeals correctly concluded that the district court erred when it made only "generalized conclusions," upholding censorship *en masse*, and failed to "deal individually with the rejected publications." (P.A. 20a). The panel concluded that prison officials "have the burden of showing that a rejection of a publication is at least 'generally necessary to protect one or more of the legitimate governmental interests

⁴³Even if a "reasonableness" standard is applied, this practice cannot be sustained under *Turner*. As noted above, the practice does not have a "logical connection" to any legitimate governmental interest in security. There also is no alternative means for inmates to exercise the right to read the unobjectionable material since the reading matter is excluded, and there is no "significant ripple" effect on fellow inmates or staff in allowing the inmate to receive the rest of the publication. Finally, there is a "ready alternative" that fully accommodates the rights at stake at *de minimis* cost to valid penological interests, namely, deleting the objectionable portion and providing the rest to the prisoner. 107 S.Ct. at 2262.

. . . of security, order or rehabilitation. *Martinez*, 416 U.S. at 414 . . . It follows that the rejections should have been addressed *individually* and none upheld unless consistent with *Martinez*." (P.A. 21a) (emphasis added).

In the court of appeals the Bureau conceded that the district court did not make "a *de novo* content-based review of each publication" but claimed that such a review was not necessary. (Pet. Brief in Court of Appeals 43). Now, for the first time, the petitioners acknowledge that whatever standard of review is ultimately applied, "clearly" a remand is required for individualized findings. (Pet. Brief 30). The petitioners correctly note that the censorship of each item "involves factual issues as to the nature of each of the publications, the perceived dangers presented by each, and even whether there continues to be a live controversy with respect to particular publications." *Id.* 30-31.

This concession is consistent with the settled principle that in all free expression cases a court "cannot avoid making an *independent* constitutional judgment on the facts of the case as to whether the material is constitutionally protected." *Jacobellis v. State of Ohio*, 378 U.S. 184, 190 (1964) (emphasis added).⁴⁴

⁴⁴The lower federal courts have followed this approach. See *Pepperling v. Crist*, 678 F.2d at 791 ("close examination of the magazine" required to determine dangerousness or obscenity); *Morgan v. LaVallee*, 526 F.2d at 224-225 ("close examination of the publication in question" required).

CONCLUSION

The judgment of the court of appeals should be affirmed, and the case remanded to the district court for further consideration under the standard enunciated in *Procunier v. Martinez*.

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No. 87-1344



In the Supreme Court of the United States

OCTOBER TERM, 1988

**RICHARD L. THORNBURGH, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS**

v.

JACK ABBOTT, ET AL.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

REPLY BRIEF FOR THE PETITIONERS

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The sole issue in this case is the appropriate standard of review for constitutional challenges to prison regulations restricting printed matter entering federal prisons. Respondents contend (Br. 20) that the correct standard is the strict scrutiny approach of *Procunier v. Martinez*, 416 U.S. 396 (1974), rather than the "reasonableness" standard that this Court has applied to prison regulations that restrict prisoners' constitutional rights. See *Turner v. Safley*, No. 85-1384 (June 1, 1987); *O'Lone v. Estate of Shabazz*, No. 85-1722 (June 9, 1987).

Respondents concede that the "reasonableness" standard is the established test when prison regulations assertedly infringe the constitutional rights of prisoners (Br. 20). Respondents also concede that a prison is a nonpublic forum (*id.* at 30) in which rea-

sonableness is the touchstone of regulations of speech. Respondents further concede that prison officials should be empowered to exclude publications from prisons "for valid security reasons" (*id.* at 11, 15). Nonetheless, respondents argue that when they are directed at mailed publications, prison officials' efforts to ensure safety, security, and order within a prison may not be judged under a "reasonableness" standard. Respondents argue that in that setting strict scrutiny is required in order to protect the constitutional rights of publishers who send materials to federal prisons.

1. The BOP's regulations governing printed matter should not be reviewed under a strict scrutiny standard merely because of the regulations' incidental effect on publishers. The more intrusive degree of scrutiny that the Court adopted in *Martinez* responded to the "particularized interest[s]" of non-prisoners in communicating with identified inmates through personal letters (416 U.S. at 408). "[M]ass mailings" (*id.* at 408 n.11), such as those involved in this case, were not at issue in *Martinez*.

The personal correspondents in *Martinez* had very different interests at stake than are present here. For an inmate's civilian correspondent, there is no adequate substitute for a personal letter to or from a spouse, friend, or family member. Personal letters uniquely allow the expression of feelings and the conveying of information about particular people. By contrast, general publications are written without regard to any individual reader and contain no personalized messages. The publications are distributed to hundreds, perhaps thousands of readers.

These differences are vital to evaluating the effect of the BOP's regulations on First Amendment rights.

Broad restrictions of a civilian's personal correspondence with an inmate would substantially eliminate that form of communication altogether. In that sense, prison mail regulations work a "consequential restriction" on the First Amendment rights of civilians (*Martinez*, 416 U.S. at 409) that does not exist for publishers who have ready access to other audiences.¹ Publishers are not restrained from printing and selling their materials.² The BOP regulations address only publications having an impact on prison security, within prisons.

This Court's cases confirm that the "particularized interest" in *Martinez* turned on the personal and

¹ Respondents appear to contend (Br. 22-23) that the prisoners' right to receive information from the publishers makes the rights of publishers "inextricably meshed" with prison subscribers within the meaning of *Martinez*, 416 U.S. at 409. But the constitutional right of prisoners to *receive* information cannot be used to elevate the standard of review. Prisoners' constitutional rights must be measured by a "reasonableness" standard, even when outsiders are involved. See *Block v. Rutherford*, 468 U.S. 577 (1984) (inmates' right to have contact visits); *Bell v. Wolfish*, 441 U.S. 520 (1979) (inmates' right to receive hardback books from sources other than publishers and bookstores). If inmates could insist on strict scrutiny because of links with outsiders as tenuous as the ones in this case, the reasonableness standard would soon be riddled with exceptions.

² Respondents argue that it is irrelevant that publishers have other audiences, noting that a state could not defend an unconstitutional restraint on speech by pointing to the availability of similar speech in other states (Br. 24). The fallacy of this argument is that while one state may not wholly prohibit a type of speech simply because another state permits it, the Court has never held that within a single state every government facility must be made available for speech. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

unique nature of civilian correspondence with specific inmates rather than simply the fact that, as in this case, civilians were involved. In considering restrictions on face-to-face media interviews with inmates (*Pell v. Procunier*, 417 U.S. 817 (1974)) prohibitions on "bulk mailing" to inmates of prison union writings (*Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977)), and restrictions on inmates' receipt of hardback books except from publishers, book clubs, or bookstores (*Bell v. Wolfish*, 441 U.S. 520 (1979)) the Court never even raised the possibility of strict scrutiny. Yet each of those regulations had incidental effects on the First Amendment rights of non-inmates. In contrast, the Court cited *Martinez* in considering (but not deciding) whether strict scrutiny might apply to the regulation of marriages between inmates and civilians (*Turner*, slip op. 17). The periodical and book publishers in this case ~~are~~ more similarly situated to journalists seeking interviews (*Pell*), senders of hardback books (*Bell*), and authors of prison union materials (*Jones*) than they are to personal correspondents (*Martinez*) or, possibly, marriage partners (*Turner*). These cases demonstrate that respondents have no genuine "particularized interest" in sending their materials into federal prisons in the sense that the Court used that term in *Martinez*.³

³ Respondents' effort to distinguish this Court's post-*Martinez* prison cases (Br. 36-37) is unavailing. For example, respondents distinguish some cases (*Block*, *Pell*, and *O'Lone*) that applied a reasonableness test when there were incidental effects on outsiders by asserting that each involved physical entry into the prison, which presents different security concerns. Yet the Court found such distinctions irrelevant when it refused to erect a "hierarchy of standards of review" based on whether an activity is "'presumptively dangerous'"

The factual distinctions between the burden on publishers in this case and the burden on personal correspondents in *Martinez* are not, as respondents suggest, legally irrelevant (Br. 22) nor is reliance on those distinctions incompatible with the First Amendment (*id.* at 23). The Court has never embraced the proposition that the First Amendment requires that mass publishers and specific individuals be similarly treated for all purposes.⁴ The BOP's regulations recognize that different considerations are involved in regulating personal mail and other printed matter.⁵ No decision of this Court requires

(*Turner*, slip op. 8-9 (refusing to find the security concerns posed by inmate correspondence "qualitatively different" from those presented by the hardback books in *Block*)).

Respondents also argue that *Turner*, *Bell*, and *Jones* do not demonstrate the Court's adherence to a "reasonableness" standard when the "expression of ideas on paper" is involved. But each of those cases reduced the flow of written expression to inmates, and in each the Court adopted a reasonableness test.

⁴ *First National Bank v. Bellotti*, 435 U.S. 765 (1978), on which respondents rely (Br. 22), is not to the contrary. In *Bellotti*, the Court considered a state law prohibiting corporate expenditures, under certain conditions, to influence ballot questions. The Court held only that "speech that otherwise would be within the protection of the First Amendment [does not lose] that protection simply because its source is a corporation" (435 U.S. at 784). But the Court left open "whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities" (*id.* at 777-778 n.13).

⁵ Respondents dispute (Br. 22 n.16) that their publications are "mass mailing[s]" as that term was used in *Martinez*, and they contend that the *Martinez* description better fits the "bulk mailings" involved in *Jones v. North Carolina Prisoners'*

that the different impact on civilians be ignored when regulating the different types of written matter that enter a prison.⁶

Respondents vastly exaggerate the significance of the BOP's regulations for the freedom "of the press." This case involves no prior restraint of the press and no elimination of viewpoints from public discussion. It would hardly "stand the First Amendment on its head" (Br. 23) to hold that prison officials have the authority to make reasonable exclusions of periodicals and books believed to be detrimental to prison security or order, simply because a different standard applies to personal letters. The press is not entitled to equal treatment with civilians who know inmates. *Pell v. Procunier*, 417 U.S. 817, 831 n.8 (1974) (upholding prohibition against face-to-face interviews of inmates by the press, although family, friends, attor-

Union, 433 U.S. at 124. Even apart from the dubious distinction between "bulk mailing" and "mass mailing," it is apparent that *Martinez* was drawing a distinction between "direct personal correspondence" and items that are sent to many people, such as the publications at issue here (see 416 U.S. at 408 & n.11).

⁶ Respondents are simply wrong in asserting (Br. 24) that the Court has never upheld a total ban on written communication to part of an audience because of the availability of ample other audiences for the expression. In *Turner*, the Court sustained a prohibition of inmate-to-inmate communication in part because it did not "deprive prisoners of all means of expression." The Court noted that the regulation "bars communication only with a limited class of other people with whom prison officials have particular cause to be concerned * * *" (slip op. 12). Thus, although the prison audience was made inaccessible, the remaining civilian audience was an adequate outlet (*ibid.*). See also *O'Lone*, slip op. 8. The BOP's regulations in this case similarly limit access only to the prisoner audience for particularized reasons while leaving open all civilian audiences.

neys, and clergy were permitted to have such visits). Moreover, reasonable prison regulations will not squelch public debate on "matters of public affairs," as respondents contend (Br. 23 n.18), and will not even do so among the prisoner population.⁷ The BOP regulations are concerned solely with publications that threaten security, discipline, or good order (see Pet. App. 22a). Indeed, the regulations expressly provide that "[t]he Warden may not reject a publication solely because its content is religious, philosophical, political, social, or sexual, or because its content is unpopular or repugnant" (*ibid.*). Moreover, under any standard, respondents can challenge the exclusion of specific material. If there is no reasonable connection between an articulated and legitimate penological goal and the item is kept out, the inmate will prevail. A "reasonableness" standard will not license arbitrary censorship or the suppression of speech with which the Bureau disagrees.

⁷ An important factor in *Martinez* was the potential of the regulations in that case to suppress criticism of the prison in outgoing letters. Indeed, nearly every fault the Court found in the regulations at issue arose from the prison officials' inability to explain how outgoing letters might "possibly lead to flash riots" or "might * * * encourage violence" within the prison itself (416 U.S. at 416). The Court has thus read *Martinez* to concern unjustified regulations of "communication[s] by inmates" (*Pell v. Procunier*, 417 U.S. at 826 (emphasis added)). See *Houchins v. KQED, Inc.*, 438 U.S. 1, 19 (1978), "[I]n *Procunier v. Martinez*, *supra*, the Court invalidated prison regulations authorizing excessive censorship of outgoing inmate correspondence because such censorship abridged the rights of the intended recipients" (416 U.S. at 31 (Stevens, J., dissenting)). The BOP's regulations in this case pose no threat of removing criticism about prisons from public dialogue.

Respondents further argue (Br. 26-28) that the *Martinez* standard adequately addresses the needs of prison officials to limit the circulation of publications that are potentially detrimental to prison security. We disagree. The *Martinez* test requires that a regulation of prison speech “must be no greater than is necessary or essential” to achieve its goal and will be “invalid if its sweep is unnecessarily broad” (*Martinez*, 416 U.S. at 413-414). The *Martinez* test is not just semantically different from the reasonableness standard but launches the courts on a “least restrictive alternative” analysis (*Turner*, slip op. 14 n.*). As this Court has recognized, demanding adoption of the “least restrictive alternative” will require “prison officials * * * to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional claim” (slip op. 11). There may always be “some court somewhere [that] would conclude that it had a less restrictive way of solving the problem at hand” (*id.* at 9). Thus, strict scrutiny will inevitably reduce the ability of “prison administrators * * * and not the courts, to make the difficult judgments concerning institutional operations” (*Jones v. North Carolina Prisoners’ Labor Union*, 433 U.S. at 128).⁶

⁶ As respondents note (Br. 27), some courts have upheld prison regulations restricting the entry of publications under a “strict scrutiny” standard. We do not believe that these cases provide useful guidance for determining the constitutional standard of review. To begin with, the decisions on which the court below relied (which were rendered prior to *Turner* and *Shabazz*) do not rest upon the First Amendment rights of outsiders; their holdings are apparently based entirely or primarily on the rights of prisoners. In light of *Turner* and *Shabazz*, it is clear that prisoners’ constitutional claims must be assessed under a reasonableness standard. In addition, as we demonstrated in our reply in support of the

Not only would strict scrutiny shift decisions about prison governance to the courts, it would also threaten to result in real and serious harms within federal prisons. Respondents have contended that the strict scrutiny standard will mandate the admission of certain printed matter into federal prisons that the BOP could keep out under a reasonableness standard. We described some of those materials in our opening brief (Br. 26). Some of those publications glorify white supremacy and racial violence; others portray and describe homosexual sadomasochism; still others instruct how to disarm an assailant (*ibid.*). Respondents now concede that some of that material is not appropriate for federal prisons (Br. 27 n.21). A strict scrutiny analysis might nevertheless have mandated its admission if prison officials could not satisfy the exacting burden of showing a serious risk of impending harm that the strict scrutiny standard demands.

We recognize that assessing the danger posed by any particular publication is a difficult task. Under any prison regulations, some errors will be made. The standard of review of those regulations, however, will determine whether regulations may be appropriately cautious or must be presumptively lenient.

government’s petition for certiorari (Pet. Reply Mem. 3 n.2), the two post-*Turner* and *Shabazz* cases cited by respondents (Br. 25 n.20) do not satisfactorily address the nature of outsiders’ concerns when prison officials regulate to achieve safety in the institution. That some prisons have continued to function under the strictures of the *Martinez* standard hardly compels all to do so, against the better judgment of prison administrators. “[T]he Constitution ‘does not mandate a “lowest common denominator” security standard, whereby a practice permitted at one penal institution must be permitted at all institutions.’” (*Turner*, slip op. 14-15 n.* (quoting *Bell v. Wolfish*, 441 U.S. at 554)).

Under strict scrutiny, prison officials will lose some measure of discretion to keep inflammatory materials out of prisons, even when they reasonably believe them to pose a risk of harm. If prison officials are right, but powerless to act, they will be unable to fulfill their obligation "[w]ithin this volatile 'community' * * * to take all necessary steps to ensure the safety of not only the prison staffs and administrative personnel, but also visitors * * * [and] the safety of the inmates themselves." *Hudson v. Palmer*, 468 U.S. 517, 526-527 (1984). The consequences of prison disruption would be borne by individual administrators, guards, or inmates and by the prison population as a whole. We submit that a standard for prison rules that requires more than "reasonableness" in regulating the potential threats to prison security from printed materials poses an unacceptable risk of harm that cannot be justified by any countervailing interest in free speech. The regulation of security-sensitive publications under a "reasonableness" standard provides the proper measure of deference to prison officials consistent with constitutional rights.

2. Respondents' characterization of the BOP's regulations as "content based" (Br. 28), and therefore deserving of heightened scrutiny, is incorrect as a factual matter and, in any event, irrelevant as applied to the prison context. We acknowledge that prison officials consider the content of publications under the BOP's regulations. That feature alone, however, does not make strict scrutiny applicable. To begin with, one factor that bears on the question whether a particular prison decision satisfies the reasonableness test is "whether prison regulations restricting inmates' First Amendment rights operate[] in a neutral fashion, without regard to the content of the ex-

pression" (*Turner*, slip op. 10). Considering content-neutrality in determining the "reasonableness" of a particular decision would be pointless if content-based regulations automatically required strict scrutiny. The reasonableness test is crafted to take account of such factors.

Second, the BOP's regulations are properly analyzed as "content neutral" because they are justified without regard to the content of the regulated speech.⁹ The regulations address the content of publications only because of their "secondary effects" on security, discipline, and order. They do not seek to suppress any point of view. They are justified, therefore, by neutral penological aims and do not regulate "content" in the sense that warrants more stringent First Amendment scrutiny.

This Court recognized the distinction between the regulation of "effects" and the regulation of "content" in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In that case, the Court sustained an ordinance that prohibited adult motion picture theatres within 1,000 feet of any church, school, or residential zone. The Court found that the ordinance was "aimed not at the *content* of the films shown," but rather at the *secondary effects* of such theatres on the

⁹ Respondents are incorrect in asserting that the government conceded in the court of appeals that the regulations are not content neutral (Br. 29). In the court of appeals, the BOP's brief stated that the argument that the regulations are not content neutral is not "well-taken" (Gov't Br. 31). The BOP maintained that the regulations were "viewpoint-neutral" although "content-related" (*id.* at 33). The government explained that "[t]he decision to admit or reject a publication is not * * * determined by an assessment of the content of the publication, but by an assessment of its impact upon a specific inmate population at a given time" (*id.* at 40).

surrounding community (*id.* at 47 (emphasis in original)). Those secondary effects were the prevention of crime, the maintenance of property values, and the protection of residential neighborhoods (*id.* at 48). Because the ordinance was aimed at those secondary effects, it was "completely consistent with [the Court's] definition of 'content-neutral' speech regulations as those that are *justified* without reference to the content of the regulated speech'" (*ibid.* (emphasis in original)).

In *Boos v. Barry*, No. 86-803 (Mar. 22, 1988), a plurality of this Court applied the *Renton* test in considering whether the District of Columbia's prohibition of signs critical of foreign governments within 500 feet of an embassy was content-based. The plurality noted that in *Renton* "[t]he content of the films being shown inside the theatres * * * was not the target of the regulation" (*Boos*, slip op. 6), and that *Renton* concerned "regulations that apply to a particular category of speech because the regulatory targets happen to be associated with the type of speech" (*ibid.*). The plurality interpreted *Renton* to hold that "[s]o long as the justifications for regulation have nothing to do with content * * * the regulation [is] properly analyzed as content neutral" (*ibid.*). The plurality then determined that the District of Columbia's regulation was not content neutral, as the government did not justify it by "point[ing] to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies" (*Boos*, slip op. 7).

The "regulatory targets" of the BOP's regulations are security, order, and discipline within federal prisons. The regulations do not seek to restrict speech because of its viewpoint. Rather, as in *Renton*, the regulations are justified by an independent objective

—maintaining security in prisons. Thus, the regulations are properly analyzed as "content-neutral."

3. Even if this Court deemed the BOP's regulations to be content-based, lines can be drawn on the basis of content in a nonpublic forum, such as a prison, without subjecting the regulations to strict scrutiny. In *Jones v. North Carolina Prisoners' Labor Union*, *supra*, the Court upheld, under a reasonableness standard, prison restrictions on bulk mailings from unions, even though similar restrictions had not been imposed on bulk mailings from the Jaycees, Alcoholics Anonymous, and the Boy Scouts (433 U.S. at 133). In that case, the prison was drawing distinctions based on content by restricting only union-related bulk mailings, yet the Court refused to apply strict scrutiny. Similarly, in *Greer v. Spock*, 424 U.S. 828 (1976), the Court upheld a prohibition against disseminating newspapers, magazines, handbills, and other publications within the nonpublic forum of a military base when the publications "present[ed] a clear danger to the loyalty, discipline, or morale of troops" (*id.* at 831 n.2). Even if the regulation in *Greer* is viewed as a content-based restriction in speech, the banning of publications from the military base was upheld without requiring the regulation to satisfy the strict scrutiny test.¹⁰ In the pres-

¹⁰ See also *Hazelwood School District v. Kuhlmeier*, No. 86-836 (Jan. 13, 1988), slip op. 9, 12 (school-sponsored high school newspaper is not a public forum and educators can regulate "the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (upholding city's ban on political advertisements in rapid transit system because advertising space on a transit system is not a public forum and because the restriction was

ent case, because a prison is "most emphatically not a 'public forum'" (*Jones*, 433 U.S. at 136; *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974)) and because the regulations at issue do not restrict publications based on the BOP's disagreement with any particular viewpoint, a reasonableness standard should apply.

Respondents do not dispute that prisons are nonpublic forums (Br. 30). Rather, they offer a variety of reasons why a nonpublic forum analysis is not applicable to the prison regulations in this case. That effort is unpersuasive and is not grounded in the decisions of this Court.

Respondents first contest that the relevant forum is the prison, and assert that the actual forum is the mails (Br. 30). But that distinction is of no use to them, because this Court has upheld the regulation of mail within a prison under a reasonableness standard. In *Turner v. Safley*, *supra*, the Court upheld a ban on inmate-to-inmate correspondence on the basis of the penological concerns raised by inmate mail. The Court's analysis in that case is irreconcilable with the notion that the mails must be viewed as a separate forum. Fragmenting a prison into a multiplicity of forums, some public, some quasi-public, some nonpublic, would serve no end but to promote litigation over distinctions that are irrelevant to the overriding need for security throughout a prison facility. In some cases, the Court has separated a government facility into different forums because of the specific nature of the access sought.¹¹ But the Court

based on legitimate concerns involving, *inter alia*, claims of favoritism that would most likely arise in the allocation of limited space).

¹¹ *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800-801 (1985) (appropriate forum was charity

has never "ignore[d] the special nature and function" of the facility as a whole "in evaluating the limits that may be imposed on an organization's right to participate * * *." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

"Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not." *Adderley v. Florida*, 385 U.S. 39, 41 (1966). Respondents have pointed to no case in which this Court opened a prison to access under any type of public forum theory. To the contrary, the Court has treated prisons as quintessential nonpublic forums, even when limited access has been made available to certain persons. See *Pell v. Procunier*, *supra*.

4. Respondents next contend that even if the Court analyzed this case under nonpublic forum principles, the BOP's regulations are not valid under the applicable "reasonableness" test (Br. 32-36). At the outset we note that the question before this Court is whether the court below erred in failing to apply a "reasonableness" test, not whether the regulations and their application to particular publications are valid under that test. The court of appeals never engaged in an inquiry under a "reasonableness" standard, and if this Court concludes that reasonableness is the appropriate test, we submit that the proper course is to permit the court of appeals on remand to determine whether the regulations are valid under that standard. Nevertheless, we briefly address the grounds urged by respondents for invalidating the BOP's regulations under a reasonableness test.

First, respondents contend (Br. 32) that the BOP's regulations are invalid because they are not "view-

drive aimed at federal employees to which access was sought, not the federal workplace as a whole); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (appropriate forum was internal mailboxes of school system).

point neutral." As we discussed above, however, the regulations *are* properly analyzed as viewpoint-neutral under the appropriate test. The regulations authorize prison officials to exclude publications only because of security concerns. In any event, as we have noted, reasonable distinctions based on content are permissible in a nonpublic forum. See *Jones v. North Carolina Prisoners' Labor Union, supra*; *Greer v. Spock, supra*.

Second, respondents argue that the BOP's regulations are unreasonable because they do not afford "alternative means by which the publisher can transmit the censored information to the prisoner subscriber" (Br. 34). Respondents fail to explain, however, why excluded material that is detrimental to prison security must be admitted through alternative channels in order to satisfy a reasonableness test. Since the total exclusion of certain material is necessary to achieve the aims of prison officials, there can be no requirement that the material be admitted in some manner in order to make the restriction "reasonable." The reasonableness test would make no sense if the exclusion of material from the front door was "reasonable" only if it had to be let in through the back. Presumably, even respondents do not contend that alternative access is required for materials such as "blueprints of a prison or instructions for the manufacture or use of drugs, keys, ammunition, or weapons, or advocacy of violence that is likely to result in violence" (Br. 15). By banning certain publications, the BOP's regulations do "no more than eliminate the exact source of evil [they] sought to remedy." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984) (upholding total prohibition of posting of signs on public property).

This Court has already twice rejected the logic of respondents' submission. In *O'Lone v. Estate of Shabazz, supra*, inmates who were members of the Islamic Faith were denied the opportunity to attend Jumu'ah, a weekly service held at a particular time of day. The Court noted that "[t]here are, of course, no alternative means of attending Jumu'ah; respondents' religious beliefs insist that it occur at a particular time" (slip op. 8). But the Court nevertheless reasoned that "we are unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end." Instead, in assessing the reasonableness of the prison regulations, the Court considered whether the inmates "retain the ability to participate in other Muslim religious ceremonies." *Ibid.* Similarly, in *Turner*, the Court considered whether inmates who were totally denied the right to correspond with each other still had sufficient alternative opportunities for expression (slip op. 12). Both of those cases demonstrate that under a "reasonableness" analysis, the "alternative channels" for the exercise of a right need not be identical to the activities restricted. In this case, publishers do not lack for alternative outlets of expression or inmates for reading material. Respondents offer no reason why these alternatives are not sufficient in this case, when similar restrictions were upheld in *Turner* and *O'Lone*.

The final argument advanced by respondents on the facial "reasonableness" of the BOP's regulations is that since "reading is not inherently incompatible" with incarceration (Br. 35), a complete prohibition on reading certain materials is not justified as a time, place, and manner regulation of speech. To begin with, however, the BOP does not regulate reading because it believes it to be "incompatible" with a

prison. As respondents note, the regulations afford inmates an ample opportunity to receive written matter. The BOP regulates the entry of written materials only to ensure prison security. The regulations simply adopt the view that certain publications have a sufficient propensity to stimulate disruption and that an ounce of prevention is worth a pound of cure. We fail to understand how the fact that the BOP finds the reading of most material unobjectionable affects the reasonableness of restricting other publications because of valid security concerns. If the reasonableness test is the proper standard, the fact that reading in general is not disruptive, and may even have rehabilitative effects, is irrelevant to the question whether the exclusion of particular materials is reasonably justified by security concerns.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

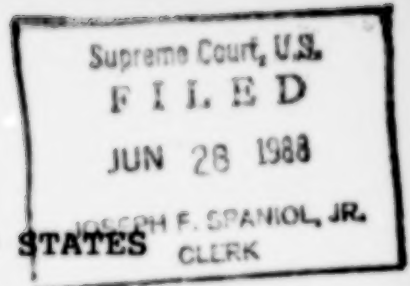
Respectfully submitted.

CHARLES FRIED
Solicitor General

SEPTEMBER 1988

NO. 87-1344

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988



EDWIN MEESE, III, Attorney General
of the United States, et al.,
Petitioners,

-vs-

JACK ABBOTT, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AMICI CURIAE
THE STATES OF FLORIDA AND IDAHO

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BRIEF OF THE AMICI CURIAE
THE STATES OF FLORIDA AND IDAHO

INTEREST OF AMICI CURIAE

The State of Florida operates a prison
system holding 32,700 inmates in 101
separate facilities.^{1/} The rules of the

^{1/} Florida Department of Corrections
(Cont. on next page)

Florida Department of Corrections permit inmates to receive publications and officials to exclude certain publications.^{2/} We have no figures available on how many publications are admitted into Florida prisons.

The State of Idaho also operates a prison system. The Idaho Department of Corrections has policies and procedures governing the receipt of publications by inmates that are similar to the United States Bureau of Prisons' (BOP) regulations. Petition for writ of certiorari filed by the Solicitor General, p. 3-4, 6, n. 205, in Meese v. Abbott, no. 87-1344, cert granted, ____ U.S. ____ (April 22, 1988).

Annual Report 1986-1987, p.7.

^{2/} Rule 33-3.012, Fla.Admin.Code.

Officials of the Florida and Idaho Departments of Corrections occasionally encounter publications that are objectionable for a variety of reasons. They may be obscene; they may contain plans for escape or be written in code. They may be racist and inflammatory to a degree that is reasonably likely to provoke violence or disruption. When inmates or publishers attempt to admit publications which are potentially harmful to the objectives of our prison system -- maintaining order and security, promoting rehabilitation -- into prisons, decisions sometimes are made to exclude all or part of a publication.

The standards which govern decisions to ban a publication will substantially affect the types of material that can be kept out of our prisons.

If this Court permits application of a "strict scrutiny" standard in such

instances, it will significantly limit the ability of corrections officials in Florida to confront and neutralize potential threats to security, order and rehabilitation. Only the reasonableness test previously adopted by this Court in matters affecting inmate rights -- the sole rights materially at stake in this case -- will provide prison officials with enough discretion to protect substantial and legitimate governmental interests in security, order and rehabilitation.

Because Idaho's and Florida's policies and procedures are similar to the BOP's, this Court's decision will directly affect them as well as those of other states that have similar publication rules for their prisons.

ARGUMENT

THE COURT OF APPEALS ERRED BY ADOPTING A CONSTITUTIONAL STRICT SCRUTINY STANDARD FOR CASES INVOLVING THE ENTRY OF PUBLICATIONS INTO PRISON. INSTEAD, THE COURT SHOULD HAVE ADOPTED THE RATIONAL BASIS TEST OF TURNER V. SAFLEY.

Like the United States, Florida and Idaho are concerned about the entry into their prisons of publications that could provoke violence or disturbances that threaten institutional security and order. We are especially concerned over our ability to prevent violence under the heightened, or strict, scrutiny standard imposed by Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). We agree with the Solicitor General that the appropriate standard should be the deference-based rational basis test of Turner v. Safley, ___ U.S. ___, 107 S.Ct. 2254 (1987), and O'Lone

v. Estate of Shabazz, ___ U.S. ___, 107
S.Ct. 2400 (1987).

We have found some publications mailed to prison inmates to present security threats, as has the Federal Bureau of Prisons. The types of documents that have caused our prison officials the most concern recently are somewhat different from those at issue in this case. Here, the petitioner is concerned about sexually explicit publications, nonexplicit homosexual publications, and materials from the American Nazi Party that preached ethnic superiority (Petition for Writ of Certiorari, p.6, n.5.).

While our officials would be concerned about such publications, those that have captured our attention have been racist and inflammatory.

Idaho prison security has been threatened by white supremacist groups.

The majority of Idaho's prisoners are white. A small number of these prisoners, at the Idaho State Correctional Institution (ISCI), are members of the Church of Jesus Christ Christian/Aryan Nations (CJCC/AN), or other religions or groups who have white supremacist beliefs. McCabe v. Arave, 626 F.Supp 1199, 1201 (D. Idaho 1986), aff'd in part and modified in part, McCabe v. Arave, 827 F.2d 634 (9th Cir. 1987).

CJCC and its alter-ego, Aryan Nations, were founded by Richard Butler. Butler preaches and espouses racial hatred, revenge and violence. Inmates with the kind of white supremacist beliefs taught by Butler have caused several incidents of racial violence at ISCI during the 1980's. McCabe v. Arave, 626 F.Supp at 1204.

CJCC's literature follows butler's teachings in that they preach race hatred and racial violence. CJCC was banned from

holding organized meetings at ISCI because of the potential of escalating prison tension, threatening and intimidating minority racial groups and compromising prison security. McCabe, 626 F.Supp at 1204.

One of the most pressing problems in the Florida prison system has been the prevalence and persistence of racial tension. That tension can, and has, led to violence for reasons that may seem trivial or even irrational to outsiders. For example, on May 5, 1988, a group of approximately 70-80 black inmates staged a minor uprising at Apalachee Correctional Institution in North Florida, beating white inmates on the prison compound.

Investigation of the incident, which was quickly quelled, indicated that the disturbance was provoked by a rumor "that if you 'Blitz Crackers' (beat up on white

inmates) you could get transferred" to a more preferable prison in South Florida (Appendix A-10).

Another example of a racially-motivated incident occurred last summer on July 9, 1987. Here, by coincidence, another group of black inmates -- about 15 altogether -- attacked and beat eight white inmates in retaliation for the cutting of a black inmate by a white inmate earlier in the day (Appendix 2).^{3/}

In order to prevent other such uprisings, riots or disturbances which could be far worse and which could result in deaths or serious injury to inmates and

^{3/} These are only a few of the racially motivated incidents that have occurred in Florida prisons. They are offered as anecdotal examples of a wide-ranging problem. We are unable to present statistical evidence of the total number of racially motivated incidents in Florida prisons because we have not kept such data.

correctional officers, Florida and other state prison officials must have the means to keep racial tensions under control. Anything that tends to increase the level of racial tension logically must increase the risk of violence.

This point was an issue in a recent case involving the constitutionality of the Florida practice of barring admission to racist and inflammatory publications. See Lawson v. Wainwright, 641 F.Supp 312 (S.D. Fla. 1986), aff'd sub nom. Lawson v. Dugger, 840 F.2d 779 (11th Cir. 1988). In Lawson, the defendant-prison officials argued that racist and inflammatory literature heightened racial tensions in Florida prisons, increasing the risk of violence, and that therefore, the admission of this literature could be restricted under the reasonableness standard. The district court agreed that the concerns of

Florida prison officials were reasonable but held the exclusion of the literature to be constitutional, applying the strict scrutiny test of Procunier v. Martinez, supra; Lawson v. Wainwright, 641 F.Supp at 323. The circuit court affirmed, applying the same standard, and on rehearing rejected arguments that Turner v. Safley should apply, citing the present case. Lawson v. Dugger, 840 F.2d 779 (11th Cir. 1988).

The application of Martinez's strict scrutiny test to cases involving publications makes it far harder for prison officials to maintain order and internal security. As the Lawson decision indicates, the strict scrutiny standard as applied by the circuit courts can substantially limit the discretion of prison officials and injects the courts too deeply into questions of what constitutes a

threat to security -- questions the courts are ill-equipped to handle. This is especially true if speech is deemed to take place inside prison where a piece of writing is read and where it will have its greatest effect. See, e.g., Procunier v. Martinez, 416 U.S. at 408-409. The constitutional interests of publishers are not great enough to justify the more exacting standard in such circumstances. Rather, such cases should turn on the First Amendment rights of inmates.

Recently, this Court re-emphasized that the constitutional rights of prisoners could be limited by prison regulations reasonably related to legitimate governmental interests in the maintenance of security, order, discipline and rehabilitation. See Turner v. Safley, ____ U.S. ____, 107 S.Ct. 2254 (1987); O'Lone v. Estate of Shabazz, ____

U.S. ____, 107 S.Ct. 2400 (1987). These decisions capped a line of cases that stood for the principle that in matters affecting legitimate interests such as security, order and rehabilitation, the courts should defer to the judgments of prison officials. Block v. Rutherford, 468 U.S. 576 (1984); Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974). The facts, holdings and principles enunciated in these latter cases differ widely from those in Martinez. However, the lower courts have tended to apply the Martinez test in cases involving inmates' constitutional rights in a way this Court apparently viewed as inappropriate. Thus, this Court felt compelled to make it plain that when inmates' rights were at stake, courts should apply the principles of

deference to the reasonable judgment of prison officials on matters affecting legitimate penological interests, and, when as here a state prison is involved, considerations of federalism should raise separation of powers to invoke judicial restraint. Turner, 107 S.Ct. at 2260-2261. Never, in the prisoners' rights cases since Martinez, has this court applied the strict scrutiny test.

Incarceration necessarily brings about the "'withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. at 125. "[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."

Pell v. Procunier, 417 U.S. at 822. Thus, in Pell this Court said challenges by prisoners to prison regulations must be analyzed "in terms of the legitimate policies and goals of the corrections system." Ibid. In Pell, 417 U.S. at 822-823, the courts identified four such concerns: deterrence, the isolation of the offender for the protection of society, rehabilitation, and the maintenance of internal security and order. See also Bell v. Wolfish, 441 U.S. at 546 (an essential objective in running a prison is "maintaining institutional security and preserving internal order and discipline"). Thus, this Court has required the lower courts to exercise deference in such cases because "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources,

all of which are peculiarly within the province of the Legislative and Executive Branches of Government." Turner, 107 S.Ct. at 2259. See also Bell v. Wolfish, 441 U.S. at 548 ("the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge").^{4/}

The Martinez test is more stringent than the rule in Turner, and requires prison regulations to be reasonably related to a legitimate penological interest and to "be no greater than is necessary or essential to the protection of the particular governmental interest

^{4/} And see Procunier v. Martinez, 416 U.S. at 405. "[C]ourts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform"; and Id. at note 9, "They are also ill suited to act as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints".

involved." Martinez, 416 U.S. at 413-414. Thus, under Martinez, a court would invalidate a regulation or practice whose "sweep is unnecessarily broad." Id. 416 U.S. at 414.

In Martinez, the only case affecting prisoners' rights in which this Court adopted a strict scrutiny test, the Court focused on the fact that more than just the rights of inmates were at issue. Martinez involved a California prison regulation permitting the censorship of inmate correspondence. This Court identified a close personal interest in such personal correspondence by both the inmate and a sender/recipient outside prison.^{5/}

^{5/} Inmate-to-inmate correspondence is not protected by the same strict scrutiny standard; instead it is subject to reasonable restrictions. Turner v. Safley, supra.

Deciding the case based not on the rights of inmates but the First Amendment rights of their outside correspondents, this Court said, "In the case of direct personal correspondence between inmates and those who have a particularized interest in communicating with them, mail censorship implicates more than the right of prisoners." Martinez, 416 U.S. at 408, emphasis added. The Court found that concerning such a "particular means of communication . . . the interests of both parties are inextricably meshed." Id., 416 U.S. at 409. It is clear that Martinez turned on this court's recognition of the intimate nature of personal correspondence. In discussing the issue, the Court used this pointed example:

The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in

communicating with him as plain as that which results from censorship of her letter to him.

Id. 416 U.S. at 409.^{6/}

Significantly, this Court saw a distinction between personal correspondence and written communications of other kinds: "Different considerations may come into play in the case of mass mailings." Id., 416 U.S. 409 n. 11. But since the issue was not raised in the case, the Court expressed no view on it.

^{6/} In Turner v. Safley, 107 S.Ct. at 2265 - 2266, the court also addressed the constitutionality of a prison rule restricting the rights of inmates to marry. The court invalidated the rule on the ground that it was not reasonably related to a legitimate penological interest. However, the court suggested that the test of Martinez might have applied. Id., 107 S.Ct. at 2266. Clearly, in a marriage, the rights of the partners are "inextricably meshed": ". . . inmate marriages, like others, are expressions of emotional support and public commitment." Id., 107 S.Ct. at 2265.

Different considerations certainly do come into play when one considers the entry into prison of books and other publications. The interest of a book or magazine publisher is far different from that of a letter writer. The letter writer has a direct personal interest in having his or her letter read.^{7/} On the other hand, a publisher's interest is more general. While a publisher has a First Amendment right to publish, he has no specific expectation that a particular individual will read what he has published. In fact, he has no more than a general hope that a publication will find an audience. Moreover, a prison regulation

^{7/} "Communication by letter is not accomplished by the act of writing words on paper. Rather it is effected only when the letter is read by the addressee." Martinez, 416 U.S. at 408.

preventing a publication from circulating inside prison is only a minor restriction of the publisher's First Amendment rights. His work may still circulate to the public at large. The regulation at issue thus is not a "consequential restriction on the First and Fourteenth Amendment rights of" a nonprisoner publisher. Procunier v. Martinez, 416 U.S. at 409; Turner v. Safley, 107 S.Ct. at 2260. For the letter writer, however, exclusion of his or her letter from prison means that the person for whom it was intended never will read the message it contained. A publisher's insistence that he has a right to place a book inside a prison is little different from the notion that a television broadcasting company has a right to install television sets for inmates. However, we know of no rule that suggests that television broadcasters have

a First Amendment interest in requiring that their programs are viewed by inmates. The interests of a publisher and an inmate are not "inextricably meshed."

There is ample support in the Turner-O'Lone line to justify applying the reasonableness test rather than strict scrutiny. In that line of cases, this Court has not hesitated to apply a reasonableness test even when the First Amendment rights of non-inmates were affected by a prison rule. For example, in Block v. Rutherford, supra, this Court upheld a ban on contact visits between pre-trial detainees and non-inmates on the ground there was a "valid, rational connection" between the restriction and the maintenance of internal security. Block v. Rutherford, 468 U.S. at 586. In Bell v. Wolfish, supra, this Court upheld a jail regulation allowing inmates to receive

books only from publishers or book clubs, a rule that implicated the First Amendment rights of private correspondents who wanted to mail books or magazines to inmates. In Pell v. Procunier, this Court reversed a court of appeals decision striking down California prison regulations prohibiting face-to-face interviews between inmates and news reporters. This Court reasoned that:

When . . . the question involves the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations.

Pell v. Procunier, 417 U.S. at 826.

Certainly in Pell, the First Amendment rights of the reporters were implicated. The Court permitted that restriction because the regulation was reasonably

related to a need to maintain security and because reporters had alternative means of access to inmates, even if those alternatives were "unimpressive if they were submitted as justification of personal communication among members of the general public." Id., 417 U.S. at 825.

And, in the recent case of O'Lone v. Estate of Shabazz, supra, First Amendment rights of non-inmates were affected by a New Jersey prison rule prohibiting inmates on certain work squads from attending a Muslim prayer service similar in importance to a Christian's Sunday service. We are informed by the Solicitor General that the religious services were performed by an outside Islamic minister. Petition for writ of certiorari filed by the Solicitor General, p. 15, in Neese v. Abbott, no. 87-1344, cert granted ____ U.S. ____ (April 22, 1988), citing O'Lone v. Estate of

Shabazz, petitioner's brief, p. 17. The religious leader's First Amendment rights certainly were implicated by the inability of his parishioners to attend services. Yet, in that case this Court upheld the regulation as reasonably related to legitimate governmental interests.

The common element among these cases and the present one is that while First Amendment rights of outsiders were affected, the interests of free citizens were not "inextricably meshed" with those of inmates. The same deeply personal interest as in personal correspondence simply was not there.

Where speech takes place is a factor to consider. In public forums, strict scrutiny applies to regulations restricting expression; in non-public forums, a regulation affecting expression does not violate the constitution if it is

reasonable in light of the purpose to be served and it is content neutral.

Cornelius v. NAACP Legal Defense and Education Fund, Inc. 473 U.S. 788 (1985); Perry Education Assn v. Perry Local Educators' Assn, 460 U.S. 37 (1983).

Prisons are not public forums. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. at 134.^{8/} Thus, the entry of publications should be subjected to the same reasonableness test in Turner and O'Lone.

^{8/} By analyzing the issue of bulk mailings in Jones in terms of whether prisons constituted public forums, this court explicitly gave further currency to the notion that written speech occurs where it is read -- here inside prison. Cf., Procunier v. Martinez, 416 U.S. at 408. As prison officials can reasonably regulate the physical entry of outsiders, Pell v. Procunier, *supra*, the court appeared to sanction the same sort of regulation of speech deemed to occur in prison.

Indeed, we view the place where speech is deemed to occur to be of particular importance. At its essence, speech is a form of conduct -- conduct based on the expression of ideas, but still conduct. Moreover, this Court has recognized that speech has the capacity to induce action, and that there are times when such action can be regulated. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 776, 86 L.Ed.2d 1031 (1942); Brandenberg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

Any speech that takes place in prison will necessarily have its first effect there. In fact, this very concept lies at the heart of this Court's decision in Turner to apply the reasonableness standard to inmate-to-inmate correspondence. It is only consistent to apply the reasonableness standard to speech in publications that are

read in prison and likely to have an effect on behavior there, particularly in light of the tenuous First Amendment interest of publishers.

Finally, we suggest the possibility that the publications at issue are not entitled to First Amendment protection. This Court has recognized that some types of speech either are excluded from, or afforded limited, constitutional protection. The First Amendment does not protect:

1. obscene material, Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957);

2. child pornography, New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982);

3. fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed.2d 1031 (1942);

4. incitement to imminent lawless activity, Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969);

5. libel, defamation or fraud; see, e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); Beauharnais v. Illinois, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed 919 (1952); Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed 155 (1939). See also Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504 n.22, 104 S.Ct. 1949, 1961 n.22, 80 L.Ed.2d 502 (1984).

We have not seen the publications which are the subject of this petition. However,

from their descriptions, it is possible that some might be classified as obscene. The American Nazi Party literature could be defamatory if it degraded other ethnic, religious or racial groups. See, e.g., Beauharnais v. Illinois, supra. Such conclusions, of course, will depend on a reading of the publications.

If any of these publications are judged obscene or defamatory, the government should be able to ban them regardless of whether this Court decides to apply the Martinez test to the admission of publications generally.

However, a conclusion that the publications at issue fall into one of these classes does not remove the need for this Court to address the constitutional issue presented. Not all publications coming into the prisons of this country can be so neatly pigeon-holed. A prison

official might reasonably conclude that a publication that cannot be so labeled is a threat to legitimate penological objectives. A clear ruling from this Court on the standard of review is necessary for the orderly operation of state prison systems.

In any event, because the interest of publishers is not as great as that of letter writers, and because the publications at issue will have their effect inside prison, the Turner-O'Lone reasonableness test is more appropriate.

We respectfully join the petitioners and ask the Court to reverse the decision of the circuit court.

CONCLUSION

This Court should reverse the decision
of the circuit court.

Respectfully submitted:

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APPENDIX 1

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS

DATE: May 17, 1988

TO: Jerry Vaughan,
Acting Inspector General

FROM: Garland Keeman

RE: INMATE DISTURBANCE, ACI EAST UNIT

On 5/5/88 at approximately 12:20 p.m. a serious disturbance occurred at ACI East Unit Compound involving a large group of inmates who were mostly black. There were some injuries to approximately 8 white inmates, none serious however. The following chronology of events that occurred was developed from information furnished by various staff members who were eye witnesses to the incident.

At approximately 12:10 P M. two inmates, (Verro Chambers #562029 and Percell Wise #246839) became involved in an altercation in the smoking area of G&H dormitory. The two were separated by other

inmates. Chambers and Wise were then escorted to the shift supervisor's office.

At approximately 12:13 P.M. a large group of black inmates began assaulting four to five white inmates on the west field adjacent to the internal gatehouse. Following this attack, approximately seventy to eighty black inmates banded together and began running and shouting toward G&H dormitory.

At approximately 12:15 P.M. a large group of black inmates began assaulting two or three white inmates on the east field adjacent the gatehouse. This same group of black inmates then began running and shouting toward A&B and C&D dormitories.

At approximately 12:20 P.M., Shift Supervisor Alford Ellis was notified of the disturbance by gatehouse officer Dianne Joyner, who also related that assistance was needed in H-dormitory. Lt. Ellis and

Sgt. Robert Jackson left the lieutenants (sic) office and headed to H-dormitory. The two met officer Curly Pittman as they entered the west side of the compound, who was escorting inmate Verro Chambers #562029. Pittman stated that everything was under control and added that officer Shellie Foxworth had responded to assist him in removing inmates Chambers and Wise from the scene. Lt. Ellis and Sgt. Jackson escorted inmate Chambers to the gatehouse. Sgt. Jackson proceeded back to the lieutenant's office, and Lt. Ellis escorted the inmate to medical so he could be interviewed and examined.

While Lt. Ellis was interviewing inmate Chambers, Sgt. Jackson arrived in medical with three white inmates who stated that they had been assaulted by black inmates who were going around assaulting white inmates at random.

Lt. Ellis then received a call that approximately (100) one hundred black inmates on the west side of the compound were running down the walk toward E&F and G&H dormitories. As Lt. Ellis entered the compound, he observed approximately 60 to 70 black inmates on the walk in front of E&F and G&H dormitories. Also there were approximately (10) white inmates who had armed themselves and were in front of the kitchen on the west side. Lt. Ellis also observed 40 to 50 inmates running out of G&H dormitory where it was reported that some white inmates had been assaulted. Also, during this time period, the gatehouse officer had reported that a white inmate had been assaulted on the east side, and approximately four white inmates were at the gatehouse seeking safety.

Correctional Officer James Mason, realizing the seriousness of the situation,

locked down E&F dormitory prior to the arrival of the group of black inmates, thus preventing them from entering.

Lt. Ellis immediately requested the assistance of additional staff. Within minutes, approximately (22) uniformed and non-uniformed officers reported. These were primarily staff assigned to work squads, confinement, warehouse and laundry.

At the same time Lt. Ellis ordered the gatehouse officer to sound the whistle three times, indicating for all inmates to return to their bunks in their respective dormitories.

At approximately 12:25 P.M. all inmates were secured in the dormitories. This inspector who was at the institution was advised. Also, the process of identification of participants began, by removing these inmates from the dormitories and placing them in Administrative Confinement.

Between approximately 12:30 and 12:35 P.M., fifteen (15) West Unit staff members arrived along with Superintendent Bill Sprouse, Regional Director Phil Shuford, Assistant Superintendents Harold Bailey and Paul Coburn, Colonel Bill Davis, Major Faircloth of Holmes CI, Prison Inspectors, Michael Cravener, Glenn Sellers, and Robert Simosen along with ten (10) RJCI and (4) CMHI security staff. Shortly thereafter, numerous medical personnel arrived and reported to the institutional medical clinic.

It is reported that only eight white inmates received medical attention for injuries consisting of abrasions and bruises.

During the process of confining identified participants, (44) inmates in disciplinary confinement and in close custody status were moved from East Unit confinement.

Nine (9) to ACI West Unit, seven (7) to OCI and twenty-eight (28) to RJCI. For approximately 3 to 4 hours on 5/5/88, the process of identification resulted in 118 inmates being placed in administrative confinement.

During the process of confining those inmates who participated, an orderly process of removing and inventorying personal property began. Normal operations of the institution were terminated, with instructions for all inmates to remain on their beds during the process of identifying inmates and removing personal property.

Additional staff were assigned to all dormitories. The serving of the evening meal proceeded at approximately 5:00 P.M., with one dormitory at a time served. At approximately 7:00 P.M., inmates were allowed to shower and participate in normal activities, with one dormitory at a time

involved. According to Colonel Bill Davis, operations were basically back to normal except with additional staff assigned.

During the morning of 5/6/88 normal institutional operations were placed into effect without incident.

At approximately 5 P.M. on 5/6/88 the process of transferring (94) of the confined inmates began, monitored by Inspectors Garland Keeman and Gary McClain. Fifty were transferred to UCI, twenty to Sumter CI and ten to Cross City CI and fourteen to Baker CI. The transfer process was completed at approximately 8:30 p.m.

CONCLUSION

Based on interviews with various staff and inmates, it is believed that several of the black participants wanted to obtain a transfer to the South Florida area because

many of their so-called "Home Boys" had recently been transferred to that location. The word was out that if you "Blitz Crackers" (beat up on white inmates) you could get transferred.

Of the 118 inmates confined following the disturbance, 50% were from Hillsborough, Broward and Dade counties.

Additionally, it is determined that the decision by Lt. Alford Ellis to have the gate house officer (Dianne Joyner) sound the whistle three times (indicating all inmates to return to their respective dormitories for emergency security count) and the inmates responding, prevented further serious injury and or property damage.

Also Lt. Ellis' request for additional staff assistance was met with immediate response.

The sounding of the whistle and the presence of responding personnel are be-

lieved to be the main factors in preventing a more serious situation.

NOTE: LOCATED IN THE OFFICE OF THIS
INSPECTOR

1. Copies of Incident Reports
2. Names of Inmate Participants
Transferred on 5/6/88
3. Names of Victims that Received
Injuries.

/s/ Garland Keeman

Correctional Officer Inspector II

SPECIAL INVESTIGATION
BREVARD CORRECTIONAL INSTITUTION
Sharpes, FL

INVESTIGATOR: Robert B. Powers
DATE OF INCIDENT: July 9, 1987
TYPE OF INCIDENT: Random Assaults
Necessitating Recall
LOCATION OF INCIDENT: Brevard Correctional Institution
VICTIM(S): See Exhibit #1
SUSPECTS: See Exhibit #2

SYNOPSIS: On July 9, 1987, at approximately 7:25 p.m., a group of Black inmates began randomly assaulting White inmates. Recall was announced several times and all inmates returned to their dormitories. These assaults were an apparent retaliation for an assault which occurred on the morning of July 9, 1987 when a White inmate cut a Black inmate on the neck.

NARRATIVE:

On July 9, 1987, at approximately 7:25 p.m., a group of Black inmates began random assaults upon White inmates. Several officers observed these assaults and Recall was announced numerous times over the

APPENDIX 2

compound public address system. These assaults began in the Housing I area and the group of inmates then moved to the recreation field continuing their assaults. These random assaults continued as the inmates were returning to their dormitories. It took approximately fifteen (15) minutes to secure all inmates back into their dormitories. One assault occurred within J Dormitory during the process of Recall. Investigation revealed no other assaults within the dormitories.

Once the inmates were secured in their dormitories, information was gathered by both staff and inmates identifying the inmates involved in these assaults. All known participants were then removed from the dormitories and placed into Administrative Confinement pending investigation of this incident. These inmates were removed

from the dormitories without incident or use of force.

Due to the large number of statements gathered as a result of this incident they will not be listed separately within the investigation.

Investigation reveals that these assaults occurred as a result of an incident which took place on July 9, 1987, at approximately 7:25 a.m. During this incident inmate Hayward, Tide #A095231 (B/M) and inmate Robb, George #089856 (W/M) were involved in an altercation where Robb cut Hayward on the neck with a razor blade. Investigation reveals that Hayward was attempting to obtain money from Robb and when Robb refused, Hayward grabbed his sunglasses. These inmates began fighting and during the course of the fight Robb cut Hayward with a razor blade. This incident is the subject of a separate investigation.

As a result of the above incident Black inmates began talking of retaliation. The instigators and main assailants have been identified as inmates Williams, Charles #096626; Banks, Tony #102090; and Reid, Derek #101856.

Eight inmates have been identified as victims of these assaults. Their names and the extent of their injuries will be listed in Exhibit #1. One of the victims, Hornsby, Malcolm #903891, required treatment at an outside hospital. The remainder of the victims requiring treatment were taken care of in the institutional clinic. Investigation reveals that there were other possible victims but they were not identified nor did they report to the clinic for treatment of any injuries.

Although several inmates reported fighting back against these assaults, no inmates identified as being the assailants in this incident reported any injuries.

Nineteen (19) inmates were transferred to various institutions the following day (7-10-87) as a result of this incident. Fifteen (15) of these inmates have been identified as participating in this incident. Inmate Hayward, Tide #A095231 was included in this transfer as the incident involving him proved to be the catalyst of the incident. Inmates Edwards, Michael #497324; Gibson, Samuel #A093734; and Thompson, Ernest #102568 were in Confinement during the incident but were identified as hollering from Confinement the following morning (7-10-87) in an attempt to incite other inmates on the compound to continue the incident. Inmate Robb, George has also been transferred to a separate facility.

As can be seen by the list of suspects (Exhibit #2) they are all young offenders serving sentences for violent crimes. Two

of the inmates are serving part of their sentences for inciting a riot in a State institution. As of this writing (7-17-87) the compound has been functioning without any further incidents and the institution has returned to normal operation.

Due to the seriousness of the assault on inmate Hornsby it is the subject of a separate investigation. Preliminary investigation reveals that this assault was committed by inmate Banks, Tony #102690.

Disciplinary reports have been prepared by the Security Department against all known assailants involved in this incident.

EXHIBITS

1. Affidavit of Lt. Roy Grose
2. Affidavit of Sgt. Walter Stoker
- 3.
4. [Material missing from copy available
5. to counsel]
- 6.
7. Affidavit of Sgt. Duane Smith
8. Memorandum of Lt. Larry Cruce
9. Affidavit of Groover, Ernest #103863 (B/M)
10. Affidavit of Jones, Donald #105340 (W/M)
11. Affidavit of Smith, Enoch #486829 (B/M)
12. Affidavit of Hornsby, Malcolm #903891 (W/M)
13. Affidavit of Garlinghouse, Edward #105565 (W/M)
14. Affidavit of Robinson, David #104126 (B/M)
15. Affidavit of Coffey, Joseph #094749 (W/M)
16. Affidavit of Roberts, George #100740 (B/M)
17. Affidavit of Truitt, Harvey #106805 (W/M)
18. Affidavit of Winslow, James #358488 (W/M)
19. Affidavit of Jackson, Randolph #100711 (B/M)
20. Affidavit of Miller, Scott #105945 (W/M)
21. Affidavit of Davis, Donald #911891 (W/M)
22. Affidavit of Forrester, Donald #B012237 (W/M)
23. Affidavit of Chapman, Mark #085841 (W/M)
24. Affidavit of Goldsmith, Damion #A099748 (B/M)
25. Emergency Log

WITNESSES: 1. Major Danny Wilkins
2. All officers and inmates
submitting statements as
listed in the exhibits.

CONCLUSIONS: This incident was a retaliation by young assaultive Black inmates against random White inmates due to the earlier incident between inmates Robb and Hayward.

The transfer of all of the suspects in this case including Robb and Hayward proved to be sufficient in quelling any further incidents.

It is recommended that a close review should be done on all of the suspects involved in this incident as many of them have been involved in similar incidents at other institutions. It is felt that these inmates should be under close management status.

/s/ Robert B. Powers
Correctional Officer Investigator I

cc:
Mr. Jerry W. Hicks, Superintendent
Inspector L. Ball, Union Correctional
Institution
Inmate Records

EXHIBIT #1

LIST OF VICTIMS

1. Davis, Donald #911891 (W/M) - Struck in jaw. Sustained a broken tooth.
2. Winslow, James #358488 (W/M) - Superficial cut on face; sore jaw.
3. Miller, Scott #105945 (W/M) - Right eye and lip slightly swollen.
4. Coffey, Joseph #094749 (W/M) - Left elbow sore.
5. Garlinghouse, Edward #105565 (W/M) - States he defended himself and he did not receive any injuries.
6. Truitt, Harvey #106805 (W/M) - States he defended himself and he did not receive any injuries.
7. Jones, Donald #105340 (W/M) - States he defended himself and he did not receive any injuries.
8. Hornsby, Malcolm #903891 (W/M) - Sustained serious injuries to his head, right eye and jaw. Was transported via ambulance to an outside hospital for treatment of these injuries.

LIST OF SUSPECTS

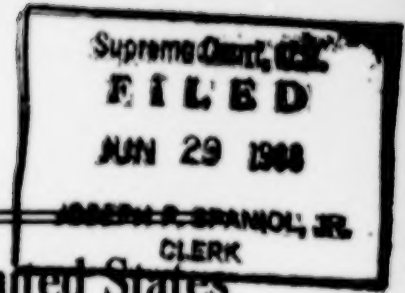
1. Williams, Charles Edward #096626 - Nineteen (19) year old Black male serving a three year sentence for burglary; grand theft; burglary of a structure; burglary of a conveyance and inciting a riot in a state institution. From Palm Beach and Jackson Counties (DOB 12-3-67). Williams was transferred to Florida State Prison on 7-10-87.
2. Banks, Tony Leon #102690 - Twenty-one year old Black male serving a twelve (12) year sentence for second degree murder and unlawful possession of a firearm while engaged in a criminal offense. From Dade County (DOB 1-22-66). Banks was transferred to Florida State Prison on 7-10-87.
3. Reid, Derek #101856 - Nineteen (19) year old Black male serving a twenty-two (22) year sentence for second degree murder and attempted robbery. From Broward County (DOB 10-7-67). Reid was transferred to Florida State Prison on 7-10-87.
4. Bryan, Clifford #406646 - Twenty (20) year old Black male serving two commitments of fifteen (15) years and one five year concurrent sentence for burglary of a dwelling; grand theft and sexual battery. From Dade County (DOB 1-27-67). Bryan was transferred to Martin Correctional Institution on 7-10-87.

5. Rayside, Ralph #099670 - Nineteen (19) year old Black male serving a four year sentence for robbery and aggravated battery. From Palm Beach County (DOB 11-27-67). Rayside was transferred to Union Correctional Institution on 7-10-87.
- 6/ Linen, Harvey Lee #A493480 - Twenty (20) year old Black male serving a nine (9) year sentence for armed robbery; grand theft and battery on a Correctional Officer. From Hillsborough County (DOB 11-6-68). Linen was transferred to Martin Correctional Institution on 7-10-87.
7. Reed, Michael #101294 - Twenty year old Black male serving a nine (9) year sentence for armed robbery and possession of a firearm while engaged in a felony. From Broward County (DOB 2-25-67). Reed was transferred to Union Correctional Institution on 7-10-87.
8. Waller, Hassan #104154 - Eighteen (18) year old Black male serving a three year sentence for grand theft; burglary and inciting a riot in a state institution. From Palm Beach and Jackson Counties (DOB 1-20-69). Waller was transferred to Martin Correctional Institution on 7-10-87.
9. Foster, Ivory Leroy #097105 - Sixteen (16) year old Black male serving a seven (7) year sentence for aggravated battery. From Jackson County (DOB 7-4-71). Foster was transferred to Union Correctional Institution on 7-10-87.

10. Shiloh, Adrian #0981809 - Twenty (20) year old Black male serving a 3-1/2 year sentence for aggravated battery. From Duval County (DOB 6-6-67). Shiloh was transferred to Union Correctional Institution on 7-10-87.
11. Monroe, Reginald Anthony #100195 - Eighteen (18) year old Black male serving a three year sentence for aggravated assault and aggravated battery. From Jackson and Gadsden Counties (DOB 10-8-69). Monroe was transferred to Union Correctional Institution on 7-10-87.
12. Winegard, Louis Alexander III #099352 - Twenty two (22) year old Black male serving a six year sentence for armed robbery. From Duval County (DOB 8-18-64). Winegard was transferred to Martin Correctional Institution on 7-10-87.
13. Owens, Virgil Leander #096333 - Nineteen (19) year old Black male serving a four and one-half year sentence for robbery with a deadly weapon. From Brevard County (DOB 10-9-67). Owens was transferred to Martin Correctional Institution on 7-10-87.
14. Odom, Tony #491796 - Twenty (20) year old Black male serving a seven year sentence for burglary; grand theft; burglary of a dwelling and uttering a forged instrument. From Hillsborough County (DOB 3-5-67). Odom was transferred to Union Correctional Institution on 7-10-87.

15. Newton, Terry Sean #096516 - Twenty (20) year old Black male serving a four year sentence for attempted robbery with a firearm and robbery with a firearm. From Dade County (DOB 12-5-66). Newton was transferred to Union Correctional Institution on 7-10-87.

(5)
No. 87-1344



In the Supreme Court of the United States

OCTOBER TERM, 1987

EDWIN MEESE III, Attorney General of the
United States, et al.,
Petitioners,

vs.

JACK ABBOTT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF FOR THE STATE OF MISSOURI AS
AMICUS CURIAE IN SUPPORT
OF PETITIONERS**

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No. 87-1344

In the Supreme Court of the United States

OCTOBER TERM, 1987

EDWIN MEESE III, Attorney General of the
United States, et al.,
Petitioners,

vs.

JACK ABBOTT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE STATE OF MISSOURI AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The State of Missouri, as amicus curiae pursuant to Supreme Court Rule 36.4, urges the Court to reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Abbott v. Meese*, 824 F.2d 1166 (D.C. Cir. 1987) for the reasons set forth herein.

INTEREST OF AMICUS CURIAE

Amicus, like the Federal Bureau of Prisons, operates prisons within its jurisdiction. Missouri currently has sixteen separate facilities throughout the state housing twelve to thirteen thousand inmates. Day-to-day administration of prisoners necessarily involves maintenance of security. A significant part of security is screening an inmate's incoming mail.

Security concerns in a prison are implicated not only when "contraband" such as illegal drugs, weapons or escape plans come through the mails, but when literature which serves to polarize and increase tensions between already existent racial groups finds its way into the prison population as well. Stopping inflammatory literature before it enters general circulation is critical. It is infinitely more difficult, and often dangerous, to remove literature after received by inmates, and, if it must thereafter be removed, it has already achieved an effect. Amicus has had to deal with precisely that fact pattern at one of the medium security institutions in Missouri. Prior to 1984, white supremacist literature in the form of mailings from the Ku Klux Klan, Aryan Nations/the Church of Jesus Christ Christian, the Euro-American Alliance and the Mountain Church of Jesus Christ the Savior, among others, was allowed into the institution. In early 1984, under a new institutional superintendent, mailings were more closely monitored and much of the above-listed literature was rejected. Prompting this approach were reports by correctional officers that racial tension and fear among black and white inmates in the housing units was high, especially due to postings and hand-outs of white supremacist literature. The institutional superintendent considered

events at Missouri's then-only maximum security prison where inmate members of groups professing a belief in white supremacy were involved in two murders, both racial in nature.

Once the new, closer review of incoming mail took effect, racial tension at the institution reduced. Correctional officers noted a much less volatile housing unit environment. The review, or screening, did not, however, survive a constitutional appeal before the United States Court of Appeals for the Eighth Circuit. In *Murphy v. Missouri Department of Corrections*, 814 F.2d 1252 (8th Cir. 1987), the Court, in a review of the procedures employed at the medium security institution to screen incoming mail under *Procunier v. Martinez*, 416 U.S. 396, 413 (1974), found the policy was "more restrictive of prisoner First Amendment rights than is necessary to maintain prison security." *Murphy v. Missouri Department of Corrections, supra*, at 1257. Therefore amicus has a strong interest in the outcome of the present case, as its resolution will directly bear upon the formulation of a mail review policy for the Missouri Department of Corrections which will pass constitutional muster.

SUMMARY OF ARGUMENT

In some areas of prison administration which are unique to prisons, deference has been given by the courts to institutional officials in their handling of day-to-day operations when a constitutional challenge is mounted to the action taken. Examples are found in the decision of prison officials to discipline inmates for committing an infraction of prison rules, in locking a prisoner in a pre-hearing detention and/or administrative segregation cell with-

out prior hearing, and, finally, in deciding when, or whether, an inmate may be released from incarceration on parole. The case at issue, while dealing with First Amendment rights, a concept not peculiarly a prison issue, does have an aspect which, when viewed in a prison setting, becomes something which necessarily triggers the special, specific knowledge of prison officials to determine the security impact particular literature has to a prison.

Because the Courts have already concluded that the length of time an inmate serves and the relative restrictiveness of his environment are questions best left to prison officials, with only a rational basis review of decisions, the selection of the same standard in questions of what literature may safely circulate in prison should likewise be applicable.

ARGUMENT

Introduction

When undertaking any analysis of constitutional rights of incarcerated persons, the basic tenet must be that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). However, "the fact of confinement and the needs of the penal institutions impose limitations on constitutional rights, including those derived from the First Amendment which are implicit in incarceration." *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 125 (1977). Prisoners "retain those first amendment rights of speech not inconsistent with [their] status as . . . prisoner[s] or with the legitimate penological objectives of the corrections system." *Hudson v. Palmer*,

468 U.S. 517, 522 (1984) quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974). In the end "there must be mutual accommodation between institutional needs and objectives and the provisions of the constitution that are of general application." *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

I.

A Reasonableness Standard of Review As Applied to Prison Officials' Decisions About the Introduction of Literature Into a Prison Is Appropriate Because the Decision Requires the Expertise of Prison Administrators Exercising Day-to-Day Operations' Skills, an Area the Courts Have Up to Now Been Loath to Undertake.

In examining this Court's opinions in the area of prisoner civil rights cases, it can be said that there is every willingness to step into the unique environment which is a prison setting to protect prisoners' civil rights, but at the same time there is a reluctance to take over the administration of prisons from the bench. The most illustrative cases are those which deal with the length and restrictiveness of confinement a prisoner faces.

Prison discipline, including the ultimate sanction of removal of an inmate's "good time" credit, or making the inmate serve more time in prison than he might have, had he not committed an infraction of the prison rules, has been an area this Court has left to the peculiar expertise of prison officials. While guiding prison administrators in what process is due an inmate before a sanction may be imposed, *Wolff v. McDonnell*, *supra*, this Court has recently capped the extent of review the federal courts may engage in when grappling with inmate civil rights challenges to discipline meted out. In *Superintendent, Massa-*

Massachusetts Correctional Institution Walpole v. Hill, 472 U.S. 445 (1985), the standard to be applied is whether there existed "some evidence" upon which a prison disciplinary board based its finding of guilt. In the *Hill* case itself, the evidence was only that four inmates were in an exercise yard, one was injured in a fight and the other three ran away, yet that was sufficient evidence to support a violation against Hill. This Court deferred to the prison officials' ability to enforce rules even on the slimmest of cases.

Relative restrictiveness of confinement while in prison, as contrasted to the conditions of confinement under the Eighth Amendment, has not caused this Court to apply a stricter standard of review. This Court has declined to entertain challenges to placement in institutions within a state's prison system, *Meachum v. Fano*, 423 U.S. 1013 (1976) and transfers between prisons even if the result is ultimately a more harsh environment. *Olim v. Wakinekona*, 461 U.S. 238 (1983). In addition, with the holding in *Hewitt v. Helms*, 459 U.S. 460 (1983), this Court has allowed prison officials to place an inmate in virtual "lock-down" status after an informal, non-adversary review of the inmate's placement in administrative segregation, while an investigation into charges of a violation of institutional rules takes place. Indeed, *Helms* remained in administrative segregation for nearly five months awaiting resolution of an investigation into his conduct during a near-riot in one of Pennsylvania's prisons.

Finally, this Court has accorded corrections officials discretion to determine when, or even if, an inmate may be released from prison on parole. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), and *Jago v. Van Curan*, 454 U.S. 14 (1981).

While there are other areas left to prison officials' decision-making rather than a court's, see e.g. *Whitley v. Albers*, 475 U.S. 312 (1986) (type of force chosen to quell an inmate disturbance), the examples provided serve to emphasize the gravity of issues prison officials are deemed to have special knowledge of, and thus are not to be second-guessed by federal courts, unless a rule or decision is not "reasonably related to penological interests". *Turner v. Safley*, U.S., 107 S.Ct. 2254 (1987); *O'Lone v. Estate of Shabazz*, U.S., 107 S.Ct. 2400 (1987). Determining what type, or kind, of publications, or mailings, which would or even could have a deleterious impact on internal institutional security is also an area this Court may safely and should defer to prison officials' expertise.

Perhaps nowhere better than in a prison can mere words and symbols, the very essence of what the First Amendment protects, have a devastating effect. In a prison context, to be able to receive mail replete with "catch phrases" i.e. "Aryan Nation", "mongrel mixed breed", "race traitor", "children of darkness" [Jews], "black plague", "the only recourse . . . is violence, anarchy, mayhem, gorilla warfare, not welfare . . ." and symbols i.e. swastikas, flags, crowns, swords, "KKK", hoods, etc., allows inmates to become an identifiable group. Once a group of "believers" is identifiable to each other, prison gangs are a likely result. Gangs are not known for their proclivity to uphold prison rules, but are rather known to thwart the rules. Allowing white supremacist literature to freely enter one of Missouri's medium security prisons, the Missouri Training Center for Men (MTCM), enabled the recipients to band together and "recruit", by means of threats, new converts to their beliefs. At MTCM recruitment caused tension as the white supremacists posted

their literature emblazoned with identifiable symbols. Rumors of an inmate "take over" circulated and the black inmates feared assaults by whites who might take the "call to arms", espoused by the literature publishers, seriously. Racial murders at the state's *maximum* security institution made the fears real. The only solution seen by MTCM's officials was to prevent the white supremacist literature from coming into the institution. The solution worked, as attested to by the correctional officers in the trial which challenged MTCM's choice. Perhaps an argument may be made that the necessity to eliminate the literature should have only occurred at that particular time, and there may be support for that proposition. However, the decision as to when, if ever, such potentially inflammatory literature should enter the prison is best left to the sound reasoning of prison administrators, whose stock in trade is gauging the atmosphere in their prisons, and not those who only occasionally, as the judiciary, are called upon to pass on corrections' decisions. Such an approach and the *Turner v. Safley, supra*, standard of review does not leave inmate plaintiffs at the mercy of cruel "captors", rather it allows for the routine of prison day-to-day operations to remain constant. Giving deference to prison administrators with respect to their normal operations and matters of prison security will not preclude all judicial review. Extraordinary operations and unusual circumstances, as well as "conditions cases", can and will continue to find their way to the federal courts, with regularity, in the form of prisoner civil rights litigation. Allocating scarce judicial resources in such a way can only benefit all parties litigant.

Amicus would urge this Court to apply a reasonableness standard of review to prison administrator's screening of

inmate mail on the basis of protecting internal security. While First Amendment issues normally trigger strict scrutiny, this Court has in other equally weighty issues deferred to corrections officials and, finally, the facts, at least in Missouri, show that white supremacist mailings, at least, do in fact create a security problem in prison.

In light of the foregoing, amicus curiae join with petitioners in requesting that this Court apply the *Turner v. Safley*, standard of review to the issues presented in the instant case.

Respectfully submitted,

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AS AMICUS CURIAE IN SUPPORT OF RESPONDENT**

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**INTEREST OF AMICUS CURIAE
CORRECTIONAL ASSOCIATION OF NEW YORK**

The Correctional Association of New
York, founded in 1844, is a private non-
profit civic organization with unique

statutory authority to visit prisons and to report its findings and recommendations to the New York State Legislature.¹ The Association, a close observer of conditions in New York State's jails and prisons, has a continuing interest in assuring safe and humane conditions for inmates and correctional employees.

We have a special interest in the issue of prisoners' access to publications because one of our chief activities is preparing public reports on aspects of the correctional and criminal justice systems, many of which are highly critical of prison authorities.² The prison popula-

¹ Act to Incorporate the Prison Association of New York, ch. 163, 1846 N.Y. Laws 175, amended by Act of June 5, 1973, ch. 398, 1973 N.Y. Laws 757.

² These include Doing Idle Time: An Investigation of Inmate Idleness in New York's Prisons and Recommendations for Change (1984); Attica 1982: An Analysis of Current Conditions in New York State's Prisons (1982); Women Prisoners at

tion is an important part of our public, and we have sent many copies of our reports to inmates upon request. A decision in this case that gives wide latitude to prison censors could cripple our ability to inform prison inmates of the fruits of our work.

STATEMENT OF THE CASE

Amicus relies on Respondents' Statement insofar as it describes the prior proceedings and the record in this case.³

(footnote cont'd)

Bayview: A Neglected Population (1985); State of the Prisons: Conditions Inside the Walls (1986); The Mentally Impaired in New York's Prisons: Problems and Solutions (1987); and AIDS in Prison: A Crisis in New York Corrections (1988).

³ Specific references to the record in the body of the brief are denominated "J.A." (Joint Appendix), "J.L." (Joint Lodging), "T." (transcript of trial), "Dep." (depositions admitted to the trial record), "Adm." (admissions in the trial record), or by trial exhibit number.

We set out below the history of "media review" disputes in New York State prisons upon which our perspective is based.

Until 1971, New York prisons had no formal standards or procedures governing the censorship of publications. See Fortune Society v. McGinnis, 319 F.Supp. 901, 903 (S.D.N.Y. 1970). Under pressure of litigation, they established review committees to determine whether publications were obscene or "tend[ed] to excite activities posing a threat to prison discipline";⁴ later, they established more detailed guidelines and procedures.⁵

⁴ Sostre v. Otis, 330 F.Supp. 941, 943 (S.D.N.Y. 1971).

⁵ Jackson v. Ward, 458 F.Supp. 546, 550 (W.D.N.Y. 1978); Sostre v. Otis, 70 Civ. 1114, unreported order (S.D.N.Y., November 8, 1971), cited in Jackson, 458 F.Supp. at 551-52.

The media review guidelines were substantively narrowed in later litigation,⁶ but inmates continued to complain of improper censorship, in many cases because prison officials utilized a new, vague guideline prohibiting "[a]ny publication which presents a clear and immediate risk to the safety of any person or a clear and immediate risk to the order of the correctional facility."⁷ When several prisoners later moved to challenge the censorship of 51 more publications, prison authorities let them have the named publications but did not reform their practices.⁸ A new

⁶ Jackson v. Ward, 458 F.Supp. at 559-63.

⁷ New York State Department of Correctional Services Directive 4572 (superseded), March 2, 1979, at 2, guideline 9. A copy of this directive is lodged with the Clerk of Court. Lodging of amicus curiae at pp. 1-6 [hereinafter "Am. Lodg., pp. ____"].

⁸ Jackson v. Ward, Civ.-1969-435, Motion for Leave to Intervene and for Further Relief (W.D.N.Y., February 27, 1981).

lawsuit was then filed citing the improper censorship of nearly 100 other publications. Dumont v. Coughlin, 82-CV-1059 (N.D.N.Y., filed October 4, 1982). This litigation was resolved by a consent judgment⁹ and a revised administrative directive, again narrowing the media review guidelines and imposing more rigorous censorship procedures.¹⁰ After these reforms, the amount of censorship, as well as inmate complaints, slowed to a trickle

and has remained at a low level.¹¹

SUMMARY OF ARGUMENT

Prison censorship is inherently subject to abuse. The persistent tendency of those in authority to suppress criticism and unwelcome viewpoints is heightened in prisons because of their authoritarian character, their isolation from outside scrutiny, and the powerlessness of their inmates. The history of "media review" in New York State prisons, like the present record, shows that prison censorship, even

⁹ The consent judgment lists 93 publications that defendants agreed plaintiffs were entitled to receive. Dumont v. Coughlin, 82 CV 1059, Stipulation for Entry of Partial Final Judgment, Attachment A (N.D.N.Y., October 12, 1983). A copy of this judgment is lodged with the Clerk of Court. Am. Lodg., pp. 7-34.

¹⁰ New York State Department of Correctional Services Directive 4572, April 24, 1986 [hereinafter "New York Directive"]. A copy of this Directive is Appendix B to this brief [hereinafter "App. B-__"].

¹¹ For example, the number of publications censored at Auburn Correctional Facility dropped from about 36 a month in 1981-82 to about seven a month in 1987-88. Dumont v. Coughlin, affidavit in support of motion for preliminary injunction, October 14, 1982, at ¶ 25, and exhibits cited; Response from Auburn Correctional Facility to Freedom of Information Law request, February 25, 1988. (Both documents are on file at the offices of the Prisoners' Rights Project of The Legal Aid Society of the City of New York.)

when nominally justified by legitimate security concerns, persistently exceeds its justification, and that specious security rationales are advanced to prevent inmates from reading materials that merely criticize prison or law enforcement officials or advance unpopular political viewpoints. The distinction between prison management and thought control is simply not well appreciated by prison censors.

For this reason, prison censorship, like other restrictions on core First Amendment interests, must be narrowly tailored to serve important governmental interests and to go no further than necessary in restricting press freedom and prisoners' right to read. Broad notions of "deference" to the supposed expertise of prison officials are misplaced in this area because of the clear likelihood that

administrative discretion will be abused. Moreover, as a rule, the reading of books, magazines and newspapers poses no substantial threat to prison security and order. Exceptions, such as instructions in making explosives, picking locks, and hand-to-hand fighting, or direct exhortations to unlawful and violent conduct, may be covered by narrowly drawn regulations.

New York's prisons have been operating under such a narrowly drawn administrative scheme for several years after a series of lawsuits raising various substantive and procedural challenges. As a result, questionable censorship and resulting inmate complaints have been drastically reduced. Prison officials have made no claim in litigation or in any other forum that inmates' reading publications pursuant to these regulations has caused any threat to security, order

or rehabilitation.

Several features of the New York regulations are noteworthy and, in our view, are necessary to the protection of prisoners' First Amendment right to read.

- Narrow, specific and exclusive descriptions of the types of material that can be censored. Vague "catchall" censorship rules invite overbroad application and reliance on personal prejudices.

- Specific statements of reasons precisely identifying both the objectionable material and the reason it violates the rules. When prison censors are required to spell out their reasoning, it is more likely that they will scrupulously follow their own rules.

- Item censorship. If only a small portion of a publication is objectionable, the prisoner should have the option of receiving the remainder.

- De novo administrative review. Because the risk of erroneous censorship is so great in prison, a detached review of the substantive propriety of censorship decisions is essential.

ARGUMENT

I. WITHOUT RIGOROUS SCRUTINY, PRISON CENSORSHIP INEVITABLY EXPANDS BEYOND ITS LEGITIMATE BOUNDS.

"All government displays an enduring tendency to silence, or to facilitate silencing, those voices that it disapproves." Arkansas Writers' Project, Inc. v. Ragland, ___ U.S. ___, 95 L.Ed.2d 209, 223, 107 S.Ct. 1722, 1730 (1987) (Scalia, J., dissenting).¹² This tendency is particularly pronounced in prisons because of their authoritarian task, their insularity, and their isolation from public scrutiny and the mainstream of

¹² Accord, Younger v. Harris, 401 U.S. 37, 65 (1971) (Douglas, J., dissenting), quoted in City of Houston v. Hill, U.S. ___, 107 S.Ct. 2502, 2512 n. 15, 96 L.Ed.2d 398, 414 n. 15 (1987) (recognizing "[t]he eternal temptation . . . to arrest the speaker rather than to correct the conditions about which he complains"). See also City of Lakewood v. Plain Dealer Publishing Co., ___ U.S. ___, 100 L.Ed.2d 771, 782-83, 108 S.Ct. 2138, 2144 (1988).

civilian life. See West v. Atkins, ___ U.S. ___, ___ L.Ed.2d ___, 108 S.Ct. 2250, 2260 n. 15 (1988); Cleavinger v. Saxner, 474 U.S. 193, 204-05 (1985); Ingraham v. Wright, 430 U.S. 651, 670 (1977).

In prisons, therefore, the danger is especially great that censors will attempt "to eliminate unflattering or unwelcome opinions" and "to apply their own personal prejudices and opinions. . . ." Procunier v. Martinez, 416 U.S. 396, 413, 415 (1974). Indeed, the Procunier Court explicitly acknowledged this danger, observing: "Not surprisingly, some prison officials used the extraordinary latitude for discretion authorized by the regulations to suppress unwelcome criticism." Id. at 415.¹³ In that case, prison

¹³ The Court acknowledged a similar danger in Cleavinger v. Saxner, noting that prison discipline committee members are "under obvious pressure to resolve a disciplinary dispute in favor of the institu-

censors vainly attempted to justify excluding letters "criticizing policy, rules or officials," "belittling staff or our judicial system or anything connected with the Department of Corrections," or containing "disrespectful comments" or "derogatory remarks." Id.

Experience with prison censorship shows that its abuse is pervasive and recurrent.¹⁴ Time and again, one finds

(footnote cont'd)

tion and their fellow employee." 474 U.S. at 204.

¹⁴ Occasionally it becomes absurd. Counsel for amicus once received a complaint that a New York prison had deemed all maps to present risks of escape, and pursuant to this edict maps of the Moon and other planets were removed from the prison library. In a Wisconsin prison, pursuant to a ban on material about making weapons, inmates were forbidden to receive an issue of The Progressive containing an article about the hydrogen bomb. New York Times, August 13, 1979; see United States v. Progressive, Inc., 467 F.Supp. 990 (W.D.Wis.), appeal dismissed, 610 F.2d 819 (7th Cir. 1979).

that the banned publications do not advocate criminal behavior or prison disruption, are not obscene, and do not instruct in bomb-building, liquor-brewing, lock-picking, escape-planning or other dangerous activities. Rather, they express the views of racial, religious, political and sexual minorities or contain information and opinion that reflects badly on authority figures or prison officials.

The caselaw is replete with examples of this kind of overbroad censorship,¹⁵ as

¹⁵ Guajardo v. Estelle, 580 F.2d 748, 760 (5th Cir. 1978) (Penal Digest International, published by the Fortune Society); Aikens v. Jenkins, 534 F.2d 751, 754 (7th Cir. 1976) (Dostoevski's The Gambler, Gibran's The Prophet, and all publications of Bantam Books); Jackson v. Godwin, 400 F.2d 529, 530-31 (5th Cir. 1968) (Ebony, Sepia, Pittsburgh Courier, and Amsterdam News banned; magazines restricted to U.S. News and World Report, Sports Illustrated, Reader's Digest, National Geographic, Outdoor Life, Saturday Evening Post, and Pocket Crossword Puzzles); Lawson v. Wainwright, 641 F.Supp. 312,

is the history of "media review" in New York. For example, in the Dumont case, supra at 6, plaintiffs challenged the censorship¹⁶ of:

Illusions of Justice: Human Rights Violations in the United States by Lennox S. Hinds, the book version of a petition submitted to the United Nations Commission on Human Rights by civil rights and church groups.

(footnote cont'd)

316-17 (S.D.Fla. 1986), aff'd sub nom. Lawson v. Dugger, 840 F.2d 781 (11th Cir. 1987), rehearing denied, 840 F.2d 779 (11th Cir. 1988) (religious publications including a dietary manual and historical accounts of lynchings of blacks); McMurry v. Phelps, 533 F.Supp. 742, 765 (W.D.La. 1982) (Life magazine); Aikens v. Lash, 390 F.Supp. 663, 671 (N.D.Ind. 1975), aff'd sub nom. Aikens v. Jenkins, supra (Quotations of Chairman Mao Tse-Tung); Laaman v. Hancock, 351 F.Supp. 1265, 1269 (D.N.H. 1972) (writings of Karl Marx and successors); Fortune Society v. McGinnis, 319 F.Supp. at 903.

¹⁶ These publications and the prison documentation are lodged with the Clerk of Court. Am. Lodg., pp. 35-68 and separate lodging.

The book, published by the School of Social Work of the University of Iowa, contains an historical account of the Attica uprising, then 11 years past, drawn from the official report on the incident, writings by the Attica superintendent, the special prosecutor in the case, and journalist Tom Wicker, news reports, and the opinion in Inmates of Attica v. Rockefeller, 453 F.2d 12 (2d Cir. 1971). The prison censor claimed the account "represent[ed] authority figures acting in a manner which would encourage anarchy and disrespect for authority figures." Am. Lodg., p. 35 and separate lodging.

Cointelpro: The FBI's Secret War on Political Freedom, by Nelson Blackstock, with an introduction by Noam Chomsky, which describes the FBI's well-known program of covert surveillance and disruption of political groups and includes after each chapter a selection of government documents obtained under the Freedom of Information Act. The prison censor claimed that two chapters were "racist in nature"; in fact, they merely described covert activities directed at black leaders. Am. Lodg., p. 36 and separate lodging.

Fortune News, August-September 1981, a newsletter that "con-

tains articles and information on prison reform, ex-convicts' rehabilitation and the activities of the [Fortune Society],"¹⁷ was censored because of "Security" and its "biased opinion of Attica."¹⁸ The magazine contains articles on the Attica uprising and commentary on prison problems in other states, a review of In the Belly of the Beast by Jack Abbott, and a talk before a seminar for judges and legislators. There is no advocacy of violent or disruptive conduct. Am. Lodg., pp. 37-49, 50.

17 Fortune Society v. McGinnis, 319 F.Supp. at 902.

18 A decade earlier the same magazine was censored because it did not "reflect[] the truth concerning conditions in the state prison facilities." Fortune Society v. McGinnis, 319 F.Supp. at 903. Similar rationales have been used by Petitioners in this case. For example, a publication called Cruzan Satellite was censored because officials believed that it was "totally inaccurate." Witkowski Dep. 120-21, 130. The exclusion of a newspaper, Labyrinth, containing an article critical of medical care at the Marion prison that officials believed was "slanted," J.A. 107, was approved by then Director Carlson because it raised issues "which may or may not be true." Carlson Dep. at 75.

Gay Community News, vol. 9, no. 26 (January 23, 1982), was censored based on an article titled "The Philadelphia Police--Brutal to Some," with the censor citing "Guideline # 2 (Homosexuality); Guideline 9 (Security); Guideline 6 (Security)." In fact, the cited article is a "news analysis" that discusses relations between the Philadelphia police and that city's gay community, emphasizing improvements since the departure of Mayor Frank Rizzo. It contains no obscenity and no advocacy of illegal or disruptive conduct. Am. Lodg., pp. 52-57, 68.

Additional examples of absurd and unjustified acts of censorship are given in Appendix A.

More recently, the New York Commissioner of Correctional Services banned Attica: A Report on Conditions, 1983 (a report prepared for public distribution by Prisoners' Legal Services of New York, a state-funded agency), bypassing the established media review procedures and standards entirely and relying instead on

his "personal and professional judgment. . . ." Abdul Wali v. Coughlin, 754 F.2d 1015, 1024 (2d Cir. 1985).¹⁹ The report discussed a recent prisoner strike and commented critically on prison conditions and staff, but it did not advocate or incite violent behavior or disobedience of prison rules.

The overbreadth of much prison censorship is confirmed by the apparent lack of damage to legitimate prison interests when formerly censored publications are given to their recipients. In Abdul Wali, for example, the court not only enjoined the censorship of the report but also attached it as an appendix to its opinion, making it available in every

¹⁹ This act of censorship was of great concern to amicus, since we had published a rather similar report on conditions at Attica the previous year.

prison law library in New York State. No disruptions or other adverse consequences have been reported. Similarly, in Dumont, supra at 6, prison officials agreed to let prisoners read the four publications described above and 89 others of similar character, and no claim was ever made that any disruption or any other damage to legitimate prison interests resulted.

Other publications have been treated similarly.²⁰ In the main proceedings in

²⁰ Prison officials abandoned their censorship of 51 publications in Jackson v. Ward, supra n. 8, with no claimed ill effect. Although Elijah Muhammad's book The Fall of America was censored, prison officials agreed when sued to let the plaintiffs read it and to change the regulation under which it had been censored. Haines v. Ward, 73 Civ. 4361, Stipulation and Order (S.D.N.Y., March 31, 1976). Prison officials also objected to two pages of Comrade George, a biography of prisoner/author George Jackson, but they inadvertently sent motion papers containing the dangerous two pages to the inmate plaintiff, with no adverse consequences. The district court granted the plaintiff summary judgment. United States ex rel. Haymes v. Preiser, 73-CV-411,

Jackson v. Ward, by the time the record was closed, defendants had conceded that there was no justification for many of their prior acts of censorship. 458 F.Supp. at 555. In short, prison censors commonly cite legitimate prison interests, but their claims collapse in the face of legal challenge or subsequent experience.²¹

(footnote cont'd)

Memorandum-Decision and Order (N.D.N.Y., July 19, 1974).

²¹ The present record contains numerous similar examples. An issue of The Call (Plaintiffs' Exhibit 15, J.L. 6-12) was rejected at Marion because "it has a tendency to glorify problem inmates, homosexuals and prison unions which have caused problems to inmates and staff. . . ." Adm. 575, 582, J.A. 114-15, but the chairman of the prison's censorship committee admitted that the publication would not be detrimental to security. J.A. 109-11.

An issue of The Militant (Plaintiffs' Exhibit 93, J.L. 50-51) was rejected in part because it "glorified problem inmates," J.L. 46-48, but Respondents consented to its admission in other litigation, and the official who had affirmed the rejection admitted that it contained

II. PRISON CENSORSHIP MUST BE
SUBJECT TO EXACTING
SUBSTANTIVE AND PROCEDURAL SAFEGUARDS

State-imposed restrictions on the freedom of speech are subjected to "exact-
ing scrutiny." First National Bank of
Boston v. Bellotti, 435 U.S. 765, 786
(1978). Prison mail censorship "must fur-

(footnote cont'd)

no articles detrimental to security. J.L. 43-44. Respondents also conceded that another rejected issue of The Militant, for July 8, 1977, also admitted by consent in separate litigation, contained no articles detrimental to prison security, good order or discipline. Adm. 802; Plaintiffs' Exhibit 90; Cripe Dep. II at 116-18.

An issue of The Guardian (Plaintiffs' Exhibit 47, J.L. 37-38) was censored because it allegedly "contained articles that promote the formation of prisoner unions and an adversary attitude among inmates towards staff" (Adm. 695, 696, J.A. 118), but the official who had affirmed the censorship admitted that these reasons were not supported in the publication. J.A. 71-72.

ther an important or substantial governmental interest unrelated to the suppression of expression" and "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." Procunier v. Martinez, 416 U.S. at 413. Even in prison, the burden of justifying censorship is on the censor. Id.²² Rights of free speech must also be protected by "rigorous procedural safeguards," Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963), "to insure that the government treads with sensitivity in areas freighted with First Amendment concerns." Chicago Teachers Union v. Hudson, 475 U.S. 292,

²² In Procunier itself, the Court noted the prison officials' failure to show how inmates' complaining letters actually threatened correctional interests. Id. at 416.

303 n. 12 (1986).²³ Prison censors, though not required to seek judicial review of censorship decisions, must provide notice, a reasonable opportunity to protest, an appeal to an official uninvolved in the original decision, and meaningful statements of reasons. Procunier v. Martinez, 416 U.S. at 417-19;²⁴ Murphy v. Missouri Dept. of Corrections, 814 F.2d 1252, 1258 (8th Cir. 1987); Hopkins v. Collins, 548 F.2d 503,

²³ In this area as elsewhere, "[t]he history of liberty has largely been the history of observance of procedural safeguards." McNabb v. United States, 318 U.S. 332, 347 (1943). "Without procedural safeguards, regulatory schemes will tend to inhibit the activity involved." United States v. Robel, 389 U.S. 258, 278 (1967) (Brennan, J., concurring).

²⁴ Although the Procunier Court did not discuss reasons, it did require a "meaningful opportunity to protest [the] decision," id. at 418, and the plan approved by the district court below required reasons. Id. at n. 15.

504 (4th Cir. 1977); Jackson v. Ward, 458 F.Supp. at 565; Cofone v. Manson, 409 F.Supp. 1033, 1041 (D.Conn. 1976).²⁵

The requirements of narrow tailoring and of procedural safeguards are largely directed at curbing the discretion of administrators and law enforcement officials. "This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the

²⁵ These procedural protections will be needed regardless of the substantive standard the Court adopts. Such safeguards will help to ensure that prison censors actually apply the appropriate test. Indeed, if the Court were to adopt the loose "reasonable relationship" test sought by Petitioners, Pet. Br. at 12ff., the need for procedural protections to guarantee accurate administrative determinations would be greater.

official to act as a censor." Cox v. Louisiana, 379 U.S. 536, 557 (1965).²⁶ "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court--part of an independent branch of government--to the constitutionally protected interests in free expression." Freedman v. Maryland, 380 U.S. at 57-58.

Consequently, in a "pure speech" case like this one, involving the rights of free citizens as well as prisoners, the Court's broad holdings regarding deference to prison administrators' discretion have little application and, indeed, are funda-

²⁶ See also City of Houston v. Hill, U.S. at ___, 96 L.Ed.2d at 414-15, 107 S.Ct. at 2512; Board of Airport Commissioners v. Jews for Jesus, Inc., U.S. ___, 96 L.Ed.2d 500, 508-09, 107 S.Ct. 2568, 2572-3 (1987); Secretary of State of Md. v. J.H. Munson Co., 467 U.S. 947, 964 n. 12 (1984); Freedman v. Maryland, 380 U.S. 51, 57-58 (1965).

mentally at odds with the nature of the right at issue.²⁷ See Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.")

That is so not only because of the

²⁷ The Court has acknowledged as much in two of its leading "deference" cases.

In Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 130 (1977), while restricting the associational activities of a prison labor union, the Court was careful to note that "First Amendment speech rights are barely implicated in this case. . . ." The prisoners had challenged the ban on "bulk mailings" of union literature--i.e., large bundles of newsletters to be distributed by inmates within the prison. Jones, 433 U.S. at 130 n. 7. The prison officials did not attempt to interfere with publications mailed individually to particular inmates. Id. at 131 n. 8.

Similarly, in upholding a content-neutral rule requiring that hardcover books be received only from publishers, book clubs or bookstores, the Court emphasized that "free speech values" were not implicated. Bell v. Wolfish, 441 U.S. 520, 552 (1979), quoting Jones, 433 U.S. at 130-31 (emphasis in original).

acknowledged dangers of overbroad censorship but also because reading by prisoners simply poses no substantial threat to prison officials' legitimate interests. Of course there are exceptions. No one disputes that instructions for making explosives, drugs or alcohol, picking locks, or prevailing in hand-to-hand combat may be denied to prisoners. But such publications are not the central issue here. Rather, most of the disputed publications consist of discussions of social and political issues--i.e., expression that is at the core of First Amendment protections. See First National Bank of Boston v. Bellotti, 435 U.S. at 786; Young v. American Mini Theatres, 427 U.S. 50, 61 (1976). There is no basis for concluding that these publications pose any real threat to security, order or rehabilitation.

This view is confirmed by the complete lack of evidence of actual damage to correctional interests caused by reading publications in the record of this case,²⁸ or of any other reported or unreported case known to amicus.²⁹ The significance

²⁸ Indeed, defendants' fact witnesses, when questioned on the subject, admitted that they could cite no examples of the adverse consequences of prisoners' reading books and magazines. Witkowski Dep. at 122, 161; Todd Dep. at 45; Cripe Dep. at II, 34; McCune, T. at 1062; Williams Dep. at 69, 140. Defendants' and plaintiffs' experts both gave testimony to the same effect. Young, T. at 1251.16; Conrad, T. at 356-57, 547 (J.A. 26); McManus, T. at 148; Sielaff, T. at 436-37, 440; Kamka, T. at 607-08; Wolfgang, T. at 21, 27-28.

²⁹ The State of Missouri, in its brief amicus curiae at 2, asserts that "postings and hand-outs of white supremacist literature" exacerbate racial tension and fear in prisons but states that its restrictions on this literature did not survive review in Murphy v. Missouri Department of Corrections, 814 F.2d 1252 (8th Cir. 1987).

Insofar as the Missouri officials are concerned with "postings and hand-outs," they have nearly unreviewable discretion to restrict these activities under Jones v. North Carolina Prisoners' Union, 433

of this evidentiary void is great. Equally compelling are the instances in which publications were excluded from one prison but permitted--indeed, in one case, sold in the commissary--in other prisons of the same security level, apparently without adverse consequences.³⁰

(footnote cont'd)

U.S. at 130, without interfering with individuals' right to read.

Moreover, prison officials' right to ban materials that incite violent action or otherwise present a concrete threat was undisturbed by the district court, 814 F.2d at 1256, and would remain so under the test we urge. Missouri's blanket ban on certain organizations' literature, regardless of its actual content, was correctly struck down. Instead, prison officials must read and review each piece of literature individually, give the intended recipient notice of censorship, and provide review of censorship decisions by another prison official. Id. at 1258.

³⁰ See, e.g., Adm. 6019-21; Williams Dep. at 101, Wilkinson Dep. at 17-18 (Hustler magazine excluded from Lewisburg, Atlanta and Springfield but sold in the commissaries of Marion, Terre Haute and Leavenworth); Adm. 575, 576, 577, 582 (J.A. 114-15), Witkowski Dep. at 100-02 (The Call excluded from Marion, Alderson and Terminal Island but received without

The experience of New York shows that restricting censorship by narrow and specific guidelines and rigorous administrative procedures can protect the First Amendment rights of publishers and prisoners without threatening the legitimate interests of correctional officials. Several important features of the New York regulatory scheme deserve the Court's attention and should be viewed as part of the minimal constitutional protection of prisoners' right to read.

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incident by subscribers in Atlanta); Adm. 840, 842, 846-59, Plaintiffs' Exhibit 74, T. 1054 (The Outlaw routinely excluded from federal prisons; admitted to Atlanta pursuant to court order without adverse consequences); Adm. 6021 (J.A. 130), 6034 (all electronics and radio publications barred at Atlanta; such publications purchased for prisoners by prison officials at Lewisburg).

A. Prison censorship should be guided by narrow, specific and exclusive descriptions of the types of material that can be censored.

Petitioners' regulations allow the rejection of publications found "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." 28 C.F.R. § 540.71(b) (1987). The court of appeals held that this criterion permitted censorship based on too loose a "causal nexus" between expression and proscribed conduct. J.A. 15a. Amicus agrees with this conclusion but urges that there is a more compelling ground for invalidation: the regulation fails to describe with specificity the kinds of material that can be banned.³¹ The result is a classically

³¹ Although the regulation does state additional, more specific criteria, these are non-exhaustive and do not serve to limit the broad and undefined scope of the more general, "catchall" prohibition.

vague regulation.

The Court has long recognized that the constitutional prohibition of vague laws "applies with particular force in review of laws dealing with speech." Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976); accord, Ashton v. Kentucky, 384 U.S. 195, 200 (1966). "The vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing." Interstate Circuit v. Dallas, 390 U.S. 676, 683 (1968).

Vague standards . . . encourage erratic administration whether the censor be administrative or judicial; "individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law"

Id. at 685, quoting Kingsley International Pictures Corp. v.

(footnote cont'd)

J.A. 15a.

Regents, 360 U.S. 684,
701 (1959) (Clark, J.,
concurring).³²

Moreover, without "express standards,"

post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

City of Lakewood v. Plain Dealer Publishing Co., U.S. ___, 100 L.Ed.2d at 783, 108 S.Ct. at 2144.

"[E]xpress standards" are also essential as a practical matter to guide prison censors acting in good faith, since few are likely to be schooled in the nuances of the First Amendment and since the establishment of a censorship agency inevitably "breed[s] an 'expertise' tend-

³² Accord, Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

ing to favor censorship over speech." ___ U.S. ___, 100 L.Ed.2d at 785, 108 S.Ct. at 2145.

Petitioners therefore should be required to promulgate express and exclusive standards describing the types of material that may be censored by prison personnel. The experience in New York demonstrates that such a requirement is both practical and necessary to keep censorship within constitutional bounds.

New York did not have a "catchall" censorship provision during most of the 1970's. After the narrowing of media review guidelines following Jackson v. Ward, 458 F.Supp. at 559-63, prison officials added a new guideline prohibiting "[a]ny publication which presents a clear and immediate risk to the safety of any person or a clear and immediate risk to the order of the correctional facility,"

without explanation or specification.³³ Prison censors then cited this guideline in continuing to censor protected political and social expression, defeating the purpose of narrowing the guidelines.³⁴

This vague guideline was eliminated in the settlement of the Dumont litigation³⁵ without damaging prison offi-

³³ See n. 7, supra.

³⁴ For example, The Iron Fist and the Velvet Glove: An Analysis of the U.S. Police, by the Center for Research on Criminal Justice, was censored on this basis, even though it consisted solely of political analysis with no advocacy of violent or unlawful action. The issue of Fortune News described supra at 16 was also censored under this guideline. Both publications and the relevant documentation are lodged with the Clerk of Court. Am. Lodg., p. 69 and separate lodging.

Further examples of the tendency to utilize this vague guideline to censor protected news and commentary on social and political subjects are found in Appendix A/ items 2, 3, 7 and 9.

³⁵ The only "residual" category in the New York directive permits censorship of publications not falling into one of the prohibited categories if they are shown actually to result in violence or dis-

cials' legitimate interests. As new problems appear, prison officials can address them with new and narrowly drawn regulations, as has already happened in New York.³⁶ Petitioners herein can also promulgate specific and exclusive standards and supplement them as needed with additional specific standards, implementing them immediately if necessary. See 5 U.S.C. § 553(b) (1977) (notice of

(footnote cont'd)

obedience. New York Directive, supra n. 10, App. B-6.

³⁶ Between the settlement in Dumont and the final promulgation of a new statewide media review directive, prison officials added prohibitions of child pornography and materials that promote the sexual performance of a child (as spelled out in a state statute), and of materials that "[d]epict or describe techniques or methods for rioting and/or information instructive in hostage or riot negotiation techniques." New York Directive, supra n. 10, Guidelines B and H, App. B-3, 5-6.

rule-making and hearing not required where "impracticable, unnecessary, or contrary to the public interest").

B. Prison officials should be required to give statements of reasons for censorship specifically identifying the content of the offending material, its location in the publication, and the specific censorship rule that it violates.

A statement of reasons for adverse governmental action is a fundamental requirement of due process. Goldberg v. Kelly, 397 U.S. 254, 271 (1970). Lower courts have required reasonably specific statements of reasons for censorship decisions. Jackson v. Ward, 458 F.Supp. at 565; Cofone v. Manson, 409 F.Supp. at 1041, n. 21. "A reasons requirement promotes thought by the decision-maker, focuses attention on the relevant points and further protects against arbitrary and capricious decisions grounded upon

impermissible or erroneous considerations." Jackson, 458 F.Supp. at 565.³⁷ Reasonable specificity is required both to "ensure constitutional decision-making . . . [and to] provide a solid foundation for eventual judicial review." City of Lakewood, ___ U.S. at ___, 100 L.Ed.2d at 792, 108 S.Ct. at 2141.

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The content of a statement of reasons for censorship should be determined by the nature of the censorship inquiry. The question presented will usually be whether the content of a publication contravenes a narrowly drawn and specific regulation.³⁸

³⁷ This formulation is paraphrased in part from Dunlop v. Bachowski, 421 U.S. 560, 572 (1975).

³⁸ The district court missed the point in

In our experience, prison censors frequently fail to read the publication at issue closely and to compare its contents with the governing rule; instead, they censor based on generalized impressions colored by their personal hostility to the views expressed. The present record reveals that this type of error is characteristic of Petitioners' publication review process as well.³⁹ To minimize

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holding that the statements of reasons need not contain "reference to the circumstances in the prison that support the Warden's decision" because it is "unwise to inform inmates of conditions that cause security concerns in the Warden." J.A. 33a. Petitioners did not cite a single instance in which "circumstances in the prison" were the basis for banning a publication.

³⁹ For example, an issue of Win Magazine (P-Exh. 101, J.L. 59-88) was censored because one article "depicts, describes or encourages activities which may lead to [the] use of physical violence or group disruption," P-Exh. 99, A-207, J.L. 52, but defendants' witness admitted that the article merely criticized the federal prison industries program. J.A. 62.

such errors, statements of reasons for censorship should be required to identify with specificity the content of the offending material, its location in the publication, and the specific censorship rule that it violates.⁴⁰

(footnote cont'd)

An issue of the socialist newspaper Workers' World (P-Exh. 105, A-244-46, J.L. 89-91) was rejected because it "supports the gay rights of inmates and rebellion and boycotting by inmates as a legitimate means of achieving goals." Adm. 934. The General Counsel who had affirmed this rejection admitted that there was nothing in it to support the censor's characterization. Cripe Dep. (II) 95-96.

An issue of The Call was rejected at Atlanta because it allegedly stated, inter alia, that "prisoners should revolt against the use of control units." In reality, as the court of appeals observed, the article in question "is highly critical of described practices, but is narrative in form" and "contains no exhortation." J.A. 18a.

The examples cited supra at n. 21, in which prison officials later admitted that the basis for censorship was false, are of a similar nature.

⁴⁰ District courts have appropriately required prison censors to give "a brief statement of the reasons, in meaningful language, for rejection of the pub-

The wisdom of such a requirement--and its manageability--is demonstrated by the experience in New York. For years, many censorship decisions were explained only by the citation of a guideline number, a cryptic notation like "Security," or reference to a page or an article without elaboration.⁴¹ Often, it was unclear whether the censor had actually applied the censorship rules to the publication's

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lication, specifying the offending portion if less than the entire publication is objectionable." Jackson v. Ward, 458 F.Supp. at 565. "It is not enough that the rejection notice recite the applicable criterion." Cofone v. Manson, 409 F.Supp. 1041 n. 21.

⁴¹ See, e.g., documentation of censorship decisions for The Iron Fist and the Velvet Glove, Fortune News, and Gay Community News (lodged with the Clerk of Court). Am. Lodg., pp. 37-49, 50, 52-67, 68, 69 and separate lodging.

content or, indeed, had read the publication at all. In the present media review directive, however, censors are required to

include a brief statement of reasons explaining why the publication is deemed to violate one or more of the media review guidelines and identifying by page number, article title, and location on the page, the contents objected to. (The [committee] shall not state that a publication is unacceptable in its entirety.)⁴²

The directive gives examples of acceptable and unacceptable statements of reasons.

Experience shows that prison censors are quite capable, if required, of explaining themselves with specificity,⁴³ and the decreased volume of censorship⁴⁴

⁴² New York Directive, supra n. 10, at 4, App. B-11.

⁴³ Amicus has lodged with the Clerk of Court several recent examples of appropriately specific statements of reasons. Am. Lodg., pp. 70-74.

⁴⁴ See n. 11, supra.

suggests that greater specificity has helped reduce the amount of unnecessary censorship in New York prisons.

C. If only part of a publication violates valid censorship rules, the prisoner should be permitted to read the remainder.

Censoring an entire publication because a small portion is objectionable violates the principle that "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." Procunier v. Martinez, 416 U.S. at 413. Given the many publications that are banned only because of a single article or portion of an article,⁴⁵ such a provision

⁴⁵ Lorenzo Ervin was denied an entire publication because of a one-page petition, although he would have preferred to receive the remainder of the publication with the petition removed. T. 754-55. An issue of Southern Struggle was rejected because of a single article. Adm. 902;

is an essential protection of inmates' First Amendment rights. The Director of

(footnote cont'd)

Plaintiffs' Exhibit 26. Three issues of The Torch and two issues of Workers' World were each rejected because of a single article. Adm. 912, 914, 916, 945, 946 (J.A. 125-27); Plaintiffs' Exhibits 37, 57. An issue of Win Magazine was rejected because of one five-page section. Plaintiffs' exhibits 99, 101; Henderson, T. 1150Q.

An example from the New York prisons is F/X New Journal #2 (November 12, 1987), a magazine about special effects technology used in film-making. The New York authorities understandably objected to five pages about the manufacture and use of explosive devices, but New York's item censorship provision gave the inmate the option of receiving the magazine without this material. See Central Office media review decision, December 8, 1987, lodged by amicus with the Clerk of Court. Am. Lodg., p. 75.

Such examples can be multiplied based on common experience. Magazines about agriculture or outdoor life may contain articles about wine-making or hand-packing ammunition, which can properly be censored, but prisoners should be able to read the other contents of such magazines.

the Bureau of Prisons admitted that there would be no threat to security in permitting item censorship and acknowledged: "There really is no reason for not doing so." Carlson Dep. 72.

Item censorship need not be administratively burdensome. The New York provision is carefully crafted for manageability, providing that the inmate may

[r]eceive the publication with the objectionable matter removed or blotted out. . . if the objectionable portions of the publication constitute eight or fewer individual pages or if they constitute a single chapter, article or section of any length. This option need not be made available if the publication is in a form other than a book, magazine, or newspaper, and if removing or blotting out portions would present physical difficulties.

New York Directive,
supra n. 10, App. B-13.

Indeed, item censorship is likely to reduce Petitioners' administrative burden,

since inmates are less likely to seek review of censorship decisions if it is clear that prison officials censor no more than their legitimate interests require.

D. Administrative review should include a de novo examination of the disputed publication and the propriety of censoring it.

Federal prisoners, in theory, have a right of appeal of acts of censorship, first to the Bureau's Regional Directors and then to the General Counsel. 28 C.F.R. §§ 540.71(d,e), 542.10 et seq. (1987). In reality, this appeal right means little, because the reviewing officials exercise only the most deferential scrutiny, with censorship decisions subject to a "presumption of regularity."⁴⁶

⁴⁶ Indeed, the reviewing official formerly did not even see the censored publication; the Bureau revised its regulations during the pendency of this case. T. 1126; Cripe Dep. I, 129-32; Cripe Dep. II, 87-90.

T. 1040-46, 1410; Cripe Dep. I, 129-32.

This Court in Procunier and the lower courts in publication censorship cases have required that censorship decisions be reviewed by an official uninvolved in the original censorship decision.⁴⁷ Such review should be de novo and based on an inspection of the censored publication itself in order to determine whether "prison officials and employees appl[ied] their own personal prejudices and opinions" or "used [their discretion] to suppress unwelcome criticism." Procunier, 416 U.S. at 415. The subject to be reviewed is not merely procedural regularity but the substantive legitimacy of the censorship.

⁴⁷ Procunier, 416 U.S. at 418-19; Murphy v. Missouri Dept. of Corrections, 814 F.2d at 1258; Hopkins v. Collins, 548 F.2d at 504; Cofone v. Manson, 409 F.Supp. at 1041.

This view is consistent with the Court's decisions concerning civilian censorship schemes,⁴⁸ because censoring agencies develop "an 'expertise' tending to favor censorship over speech." City of Lakewood v. Plain Dealer Publishing Co., ___ U.S. ___, 100 L.Ed.2d at 785, 108 S.Ct. at 2145 (1988). As noted supra at 11, the need for independent review of the censor's acts is, if anything, greater in the prison context than elsewhere. That review must independently address the propriety of each act of censorship based on an examination of the censored material and close scrutiny of the censor's reason-

⁴⁸ Indeed, in non-prison cases, the Court has held that "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression." Freedman v. Maryland, 380 U.S. at 58. See Jacobellis v. State of Ohio, 378 U.S. 184, 187-90 (1964) (rejecting "substantial evidence" review of obscenity determinations).

ing.

The importance of independent review is demonstrated by experience in New York. The Central Office Media Review Committee in New York reviews facility censorship decisions de novo with a copy of the publication available. Even after the Dumont reforms, substantial numbers of decisions are reversed on appeal,⁴⁹ demonstrating that the risk of erroneous deprivation of First Amendment rights by censors working in a prison remains high and that the value of detached and independent review in avoiding such deprivations is great.⁵⁰

⁴⁹ Of 62 Central Office media review decisions recently reviewed by counsel for amicus, 18 reversed the facility decision with the statement: "This publication does not violate any of the guidelines in Directive 4572." See Central Office media review decisions, November 1987-January 1988, on file in the offices of the Prisoners' Rights Project of The Legal Aid Society of the City of New York.

⁵⁰ See Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976); see also Cleavinger v. Sax-

CONCLUSION

Adoption of a relaxed standard of judicial review of prison censorship would constitute "an abnegation of judicial supervision . . . inconsistent with [the Court's] duty to uphold the constitutional guarantees." Jacobellis, 378 U.S. at 187-88. Under our Constitution, it is the courts that have the expertise, and to whom deference is due, in matters of free speech. Landmark Communications, Inc. v. Virginia, 435 U.S. at 842-43; Freedman v. Maryland, 380 U.S. at 58; Emerson, The System of Freedom of Expression at 13 (1970); Monaghan, "First Amendment 'Due

(footnote cont'd)

ner, 474 U.S. at 204 (" . . . the relationship between the keeper and the kept . . . hardly is conducive to a truly adjudicatory performance").

Process," 83 Harv.L.Rev. 518, 523-24 (1970).

The courts should, of course, minimize their involvement with prison censorship insofar as they can do so without jeopardizing First Amendment rights. To this end, the Court should adopt prospective safeguards for prison censorship that will minimize the overbreadth of such censorship and thereby obviate the need for most judicial review of particular censorship disputes. These safeguards should include:

- Narrow, specific and exclusive guidelines spelling out the type of material that can be censored;
- Explicit statements of how the content of the publication violates a specific censorship rule;
- Censorship only of those portions of a publication that violate specific censorship rules, within manageable limits; and
- Independent, de novo administrative review that includes

substantive scrutiny of the publication as well as procedural review.

In this light, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

New York, New York
August 22, 1988

Respectfully submitted,

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APPENDICES

APPENDIX A

Additional Examples of Unjustified Censorship from New York State Prisons Prior to the Dumont v. Coughlin Reforms¹

1. Revolutionary Worker, vol. 3, no. 47 (April 2, 1982), was censored because "Articles on pages 12 and 19 call for revolution/unrest against the United States." In fact, one article concerns a 1967 peasant revolt in India, and the other, "The '60s-70s Shift," concerns the alleged errors of Chinese leadership and the resulting lessons for Marxist-Leninist thinkers. There is no advocacy of disruptive or unlawful conduct. Am. Lodg., pp. 76-95, 96.

2. The Militant, vol. 46, no. 1

¹ These items and corresponding documentation are lodged with the Clerk of Court. Am. Lodg., pp. 76-267.

(January 1, 1982), was censored because of an article titled "Lessons of Polish Workers' Struggle." The censor cited "Guidelines 5 (. . . rebellion against governmental authority) & Guidelines 6 & 9 (Security)." The article endorses "the heroic struggles of the Polish workers and farmers" and advocates "telling the truth about what the Polish workers and farmers have been fighting for." Similar sentiments were shared by most Americans, including President Reagan.² Am. Lodg., pp. 97-116, 117.

3. The Militant, vol. 46, no. 2 (January 22, 1982), was censored because of an article titled "Milwaukee Cop Indicted for Murder in Killing of Black

² See "Reagan Tells Polish Regime Its 'Crime Will Cost Dearly'; Curbs Credit and Commerce," New York Times, December 24, 1981, at 1, 10.

Youth," based in part on "Guideline 9 (Security); Guideline 6 (Security)," without further explanation. Another inmate was denied the publication because of the "Milwaukee Cop" article and another article, "Haitian Refugees Fight Reagan Detention Camps," with a similar lack of explanation. Neither story advocates any illegal acts; both report events that were widely publicized in the press³ and on radio and television. Am. Lodg., pp. 119-138, 139.

4. The Militant, vol. 46, no. 21

³ See, e.g., "Accidents or Police Brutality," Time, October 26, 1981, at 70; "Milwaukee's Cops Under Fire," Newsweek, February 15, 1982, at 31; "Two Officers Arraigned in Death in Milwaukee," New York Times, February 6, 1982, at 7; "Flash Fires of Rumor Keep Haitian Camp on Edge," New York Times, January 1, 1982, at 7; "Improvements Pledged for Haitian Refugee Site," New York Times, January 7, 1982, at 14; "The Haitian Chant: Liberte," Newsweek, January 11, 1982, at 27.

(June 4, 1982), was censored because an article "presents authority figures acting in a violent way toward the population. This article could support the concept of anarchy and rebellion against governmental authority." The censor cited "Rules 5 + 6 (Security)." The article, "Brutal police attack in Puerto Rico," recounts the eviction of 200 families from a shantytown near San Juan. It advocates donations of medicine, clothing and money for the evicted persons. Am. Lodg., pp. 140-155. 156.

5. The Militant, vol. 46, no. 22 (June 11, 1982), was censored because an article "presents law enforcement officials in a manner which could lead to anarchy and therein present a threat to the safety and security of the correctional facility." The censor cited "Rules 5 + 6 (security)." The story, "Protests

hit racist L.A. cop's defense in murderous chokehold," concerns the controversy over the Los Angeles Police Chief's remark that "in some blacks when [the chokehold] is applied, the veins or the arteries do not open as fast as they do in normal people." This controversy was widely reported in the national press⁴ without causing discernible anarchy in prison or elsewhere. Am. Lodg., pp. 157-176, 177.

6. The Militant, vol. 46, no. 29 (July 30, 1982), was censored because page 24 violated guideline 3, prohibiting publications that "incite violence based on race, religion, creed or nationality." Page 24 contains one article about the

⁴ See, e.g., "The Chokehold Controversy," Newsweek, May 24, 1982, at 32; "Los Angeles Police End Use of Choke Hold That Stops Air," New York Times, May 8, 1982, at 20; "Urban League in Los Angeles Asks Police Chief Suspension," New York Times, May 12, 1982, at A-24.

Socialist Workers' Party's election campaign and the need for help with petitions, one article about the killing of a black youth in Bessemer, Alabama,⁵ and a third article about the death of a black transit worker at the hands of a white mob in Brooklyn.⁶ Am. Lodg., pp. 178-201,

⁵ The "incitement" in the Bessemer story consists of a witness's statement that

" . . . the city should fire the officer, the [victim's] family should be well paid, and [the officer] should be charged with murder. If the grand jury doesn't turn in an indictment, people ought to demonstrate and picket these folks." Suggesting a business boycott, he said, "You can hurt them if you just keep the money in your pocket."

⁶ In this story, a black minister delivers the following "incitement":

. . . You [whites] can give this community an image to be proud of by taking a strong public stand against this racist murder and all racism and . . . by standing up tall for human rights and dignity.

The Brooklyn incident was front-page news

202.

7. The Torch, vol. 9, no. 2 (February 15-March 4, 1982), was censored because of two articles on page 6, "Racist rampage at Brushy Mountain prison" and "Killer cops go free," which were allegedly "based on racism and could incite a disturbance in a correctional facility. These articles could therefore present a risk to the safety and security of inmates housed in our correctional facilities." The censor cited guideline 9, prohibiting material that "presents a clear and immediate risk to the safety of any person or . . . to the order of the correctional facility."

The first article describes an inci-

(footnote cont'd)

in the daily press. See New York Times, June 23, 1982, at 1.

dent in which white prisoners shot several black prisoners. The second article discusses the death in a California jail of Ron Settles, a black football player, and the dismissal of complaints against two Milwaukee police officers accused of killing Ernest Lacy, a black detainee. All three of these incidents were widely reported in the national press.⁷ The stories are in no sense "based on racism"; at most, they report events which arguably demonstrate that racism exists. Am. Lodg., pp. 203-224, 225.

⁷ See, e.g., "Inquiry on Jail Death of Black Athlete Widens Divisions in California Town," New York Times, November 2, 1981, at A-16; "Milwaukee Police Target of Sit-In," New York Times, February 7, 1982, at 73; "Fortress Prison Harbors Violence That Erupted in Death of 2 Blacks," New York Times, February 17, 1982, at 16; "Accidents or Police Brutality," Time, October 26, 1981, at 70; "Milwaukee's Cops Under Fire," Newsweek, February 18, 1982, at 31.

8. Workers World, vol. 24, no. 3 (January 16, 1982), was censored because of an article on page 2 titled "Lesbian, Gay Focus of PAM [People's Anti-War Mobilization] Slams Racism"; the censor cited several of the media review guidelines, but the only explanatory material is the phrase ". . . rebellion against governmental authority . . ." and the word "Security." The article in question reports the passage of a resolution condemning

All forms of racism, sexism and discrimination against lesbians and gay men, the elderly and the disabled. . . . The Lesbian and Gay Focus of PAM fully supports all activities aimed at ending racist policies, and calls upon all community individuals and organizations to support that struggle.

There is no advocacy of disruptive or unlawful conduct. Am. Lodg., pp. 226-241, 242.

9. The Torch, vol. 9, no. 5 (May 15-June 14, 1982), was censored because an article on page 2 "could lead to emotional reaction which could present a risk to the safety and order of a correctional facility," based on guideline 9, quoted above. The article consists of a column from a Connecticut newspaper written by a federal prisoner concerning a federal court injunction barring his transfer to Wisconsin.

The article contains no advocacy of unlawful, violent or disruptive activity, and the facts of Mr. Simmat's case are available to every prisoner who has access to a law library in Simmat v. Manson, 535 F.Supp. 1115 (D.Conn. 1982). Am. Lodg., pp. 243-266, 267.

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APPENDIX B

STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES DIRECTIVE 4572

Subject: Media Review

(4/24/86)

I. POLICY

It is Departmental policy to encourage inmates to read publications from varied sources if such material does not encourage them to engage in behavior that might be disruptive to orderly facility operations. Accordingly, inmates shall be allowed to subscribe to and possess a wide range of printed matter such as books, magazines and newspapers, subject to the provisions of this directive, because these items may promote constructive individual development.

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In the event that the Superintendent, or his designee, believes that printed material addressed to an inmate represents a possible threat to orderly facility operations, that material will be referred to the Facility Media Review Committee (FMRC) for its assessment and disposition.

Exception: At Auburn Correctional Facility and Clinton Correctional Facility the provisions of the Dumont stipulation take precedence whenever they differ from the provisions of this directive.

II. STANDARDS

The Department adopts the following guidelines by which literature for inmates will be evaluated.

A. In general, the materials should be acceptable for regular mailing according to United States postal law and regulations.

B. Publications which contain child pornography or which promote a sexual performance of a child in violation of Penal Law Article 263 are unacceptable. Publications which, taken as a whole, by the average person applying contemporary community standards, appeal to prurient interest, and which depict or describe in a patently offensive way sexual bestiality, sadism, masochism, or necrophilia, and which taken as a whole, lack serious literary, artistic, political or scientific value are obscene and are unacceptable.

C. The publication should not incite violence based on race, religion, sex, sexual orientation, creed, or nationality. "Incite violence," for purposes of this guideline, means to advocate, expressly or by clear implication, acts of violence.

D. Any publication which advocates and presents a clear and immediate risk of lawlessness, violence, anarchy or rebellion against governmental authority is unacceptable.

E. The publication should not incite disobedience towards law enforcement officers or prison personnel. "Incite disobedience," for purposes of this guideline, means to advocate, expressly or by clear implication, acts of disobedience.

F. The publication should not give instruction in the use or manufacture of firearms, explosives, and other weapons, or depict or describe their manufacture. Mere depictions of the use of hunting and/or military weapons which reasonably would not affect the safety and/or

security of the facility are not prohibited.

G. The publication should not provide instruction by word(s) or picture(s) regarding martial arts skills. Martial arts includes, but is not limited to, aikido, jiu-jitsu, judo, karate, kung fu, and tai chi ch'uan. Publications which discuss martial arts without providing instruction are acceptable.

H. The publication should not:

1. Contain information which appears to be written in code; or
2. Depict or describe methods of lock picking; or
3. Depict or describe methods of escape from correctional facilities; or
4. Depict or describe procedures for the brewing of alcoholic beverages or the

manufacture of drugs or use of illegal drugs; or

5. Depict or describe methods or procedure of smuggling prison contraband; or

6. Depict or describe techniques or methods for rioting and/or information instructive in hostage or riot negotiation techniques.

The Department reserves the right to deny the inmate publications which may be held non-inciteful or non-advocative, as the case may be, during the Media Review Process, but which actually result in violence or disobedience after entrance into a facility, as is clearly set forth in guidelines 3 and 6 above. Such items shall be referred to the Facility media Review Committee, and if appealed, referred to the Central Office Media Review Committee, for decision.

Publications which discuss different political philosophies and those dealing with criticism of Governmental and Departmental authority are acceptable as reading material provided they do not violate the above guidelines. For Example, publications such as Fortune News, The Militant, The Torch/La Antorcha, Workers World and Revolutionary Worker shall generally be approved unless matter in a specific issue is found to violate the above guidelines.

The purpose of the foregoing guidelines are to facilitate access by inmates to a wide range of literature.

Superintendents and staff of correctional facilities are urged to use whatever means they have available to provide facility libraries with literature which presents

differing points of view relevant to the issues of the day.

III PROCEDURE

In view of the above considerations, the Department specifies the following procedures for the evaluation and approval or disapproval of literature for inmates.

A. Establishment of Facility Media Review Committee (FMRC)

Each institution will establish a media review committee. It is suggested that this committee consist of representatives from Program Services (for example, representatives from the Service Unit, Mental Hygiene staff, Chaplains' Office, Education staff, and Library staff) and representatives from Security staff.

The superintendent will inform the Commissioner of the membership of the facil-

ity Media Review Committee. The superintendent will also inform the Commissioner of any changes in said membership.

B. Referral of Publications to FMRC, Notice to Inmate

Publications properly received at the facility for an inmate in mail or packages shall be delivered to the inmate in the ordinary course of mail or package delivery unless referred to the FMRC upon a reasonable good faith belief that the publication violates one or more of the media review guidelines listed in Section II above of this directive.

When there is a good faith belief that a publication already belonging to or in possession of an inmate violates one or more of the media review guidelines, said publication shall be confiscated and

referred to the FMRC for review and decision.

Publications referred to the FMRC shall be delivered promptly to FMRC. Notice to the inmate (Exhibit A) advising of such referral must be placed in the institutional mail at the same time as the publication is referred.

C. Facility Media Review Committee Operations

1. The FMRC shall meet at least once weekly unless there are no publications for review.

2. A decision regarding a publication shall be rendered by the FMRC within ten working days of the publication's receipt at the facility.

3. Should the FMRC approve a publication, said publication shall be forwarded promptly to the inmate.

4. Should the FMRC disapprove a publication, such decision shall be in the form provided in Exhibit B, and include a brief statement of reasons explaining why the publication is deemed to violate one or more of the media review guidelines and identifying by page number, article title, and location on the page, the contents objected to. (The FMRC shall not state that a publication is unacceptable in its entirety). An example concerning such brief statement of reasons is set forth below:

The following is an acceptable statement of reasons:

"This publication incites inmates to commit assaults on correctional officers in the Article 'Prison Rebellion Now' on page 10, near the bottom."

The following is not an acceptable statement of reasons:

"This publication incites disobedience towards law enforcement personnel on page 10."

5. Notice to Inmate. When the FMRC disapproves a publication, a copy of Exhibit B (see C-4 above) shall be sent promptly to the inmate.

D. Inmate Options Regarding Appeal or Other Disposition When Notified That a Publication Has Been Disapproved by Facility Media Review Committee

When the FMRC disapproves a publication, the inmate shall be permitted to select one of the following methods of disposition: (see Exhibit B)

1. Appeal to the Central Office Media Review Committee (COMRC). The

inmate shall not be entitled to appeal unless he chooses this option within 30 days of the FMRC decision.

2. Receive the publication with the objectionable matter removed or blotted out. This option shall be available only if the objectionable portions of the publication constitute eight or fewer individual pages or if they constitute a single chapter, article or section of any length. This option need not be made available if the publication is in a form other than a book, magazine, or newspaper, and if removing or blotting out portions would present physical difficulties.

3. Have the publication sent, at the inmate's expense, to a person of the inmate's choice, not another inmate or a Department of Correctional Services official, either immediately or after 30 days.

4. Have the publication destroyed

after 30 days. If the inmate does not make a choice among these options within 30 days of the FMRC decision, the facility may dispose of the publication in any manner.

E. Appeals to Central Office Media Review Committee

When an inmate elects to appeal the FMRC's disapproval of a publication, he shall check the appropriate box on the disposition notice (Exhibit B). He may also, at his option, submit an appeal letter. The FMRC shall forward the appeal notice and letter, if any, with the publication in question to the COMRC. Appeals shall be forwarded at facility expense by first class mail or equally prompt means.

F. Establishment of Central Office Media Committee (COMRC)

The Central Office Media Review Committee (COMRC) will consist of representatives of Program Services, Security Services, and Administrative Services. The Committee will be chaired by the Deputy Commissioner for Program Services or his designee.

G. Central Office Media Review Committee (COMRC) Operations

1. The COMRC shall meet at least once weekly unless there are no publications awaiting review.

2. All publications appealed to the COMRC will be reviewed and a decision rendered thereon within 3 weeks of the date the appeal was received by the COMRC.

3. The COMRC in deciding whether to approve or disapprove a publication shall consider any statements submitted in a timely manner.

4. The COMRC decision shall be in

the form provided in Exhibit C. The COMRC will notify the Superintendent and he, in turn, will notify the inmate of the decision.

5. When the COMRC disapproves a publication, the inmate shall have the following options:

a. Receive the publication within the objectionable portions blotted or cut out. This option is available only if the objectionable portion is eight pages or less, or a single chapter, article, or section of any length.

b. Have the publication sent, at the inmate's expense, to a person of the inmate's choice, not another inmate or a Department of Correctional Services official, either immediately or after 30 days.

c. Have the publication destroyed.

d. Have the publication retained at the facility for 30 days while the inmate makes arrangements for its disposition, including being picked up by a visitor during the period.

If a choice is not made within 30 days, disposal of the material will be at the discretion of the Superintendent.

H. List of Approved Publications Approved by the Central Office Media Review Committee.

On a weekly basis, the COMRC shall prepare a list of all the publications it has approved in the past week, and shall mail a copy of that list to the chairman of each FMRC.

I. Action by the Facility Media Review Committee on Held Items Approved by the Central Office Media Review Committee

The chairman of each FMRC shall determine whether the names of any publications previously disapproved by the FMRC appears on the list, and whether said publication is being held pursuant to inmate choice. Should any such publication be in the possession of the FMRC, it shall immediately be forwarded to the inmate.

J. SUBSCRIPTIONS

Inmates will not be prohibited from subscribing to newspapers, magazines, and periodicals, but shall be informed that individual issues may be withheld if material contained therein is confirmed to be in violation of the guidelines set forth in this Directive. If, after being advised of these conditions, inmates wish to subscribe to newspapers, magazines, and periodicals, they will be allowed to do so.

K. SOURCE OF PUBLICATIONS*

Books, magazines and periodicals received from other than the publisher may be delayed through the Package Room up to six days while being subject to Media Review guidelines. All material is subject to Media Review guidelines.

Newspapers may only be received from the publisher or an approved distributor, subject to Media Review guidelines.

L. RE-REVIEW

A re-review of a publication which has been disapproved by a FMRC will be conducted by the FMRC upon the request of an inmate no less than eighteen months subsequent to the previous disapproval.

* The text of sub-paragraph III-K was added by amendment of 1/6/87.

Nothing contained herein shall prevent review of such publications by the FMRC or COMRC prior to eighteen months after disapproval, where conditions warrant.

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EXHIBIT "A"

REFERRAL NOTICE

_____ CORRECTIONAL FACILITY

Date: _____

Inmate Name: _____

Identification No.: _____

Cell Location: _____

The following publication

(Title)

(Author, Date or Volume and Number)

has arrived at the facility addressed to you and has been held for review by the Facility Media Review Committee. You are invited to submit a written statement in support of the admission of the publication. Address your comments to: _____

_____, Chairperson of the Facility Media Review Committee, promptly,

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since the committee must reach a decision usually within ten working days of the date of this notice.

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EXHIBIT "B"

DISPOSITION NOTICE

_____ CORRECTIONAL FACILITY

MEDIA REVIEW COMMITTEE

DATE: _____

INMATE NAME NUMBER CELL LOCATION

The publication _____
(Title)

(Author, Date or Volume & Number)

has been reviewed by the Facility Media Review Committee and the following portions:

(Pages, Articles, or Location of Offensive Portions)

have been found unacceptable for the following reasons:

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(Guideline Number and Reason)

You now have the following options (please check one):

() Appeal to the Central Office Media Review Committee by checking this box and sending this form and (if you desire) a letter in support of your appeal to the Facility Media Review Committee (FMRC).

() Receive the publication with the objectionable portions blotted or cut out. This option is available only if the objectionable portion is eight pages or less, or is a single chapter, article, or section of any length.

() Have the publication sent to a person of your choice, not another inmate or a Department of Correctional Services official, at your expense after 30 days. If the FMRC receives notice that this publication has been approved before it is sent out, you will receive it.

() Have the publication sent to a person of your choice, not another inmate or a Department of Correctional Services official, at your expense immediately.

Send to: _____

() Have the publication destroyed after 30 days. If the FMRC receives notice that the publication has been approved before it is destroyed, you will receive it.

If you do not make a choice within 30 days, disposal of your material will be at the discretion of the Superintendent or his designee.

INMATE SIGNATURE

DATE

EXHIBIT "C"

DEPARTMENT OF CORRECTIONAL SERVICES
CENTRAL OFFICE MEDIA REVIEW COMMITTEE

Building 2, State Campus

Albany, New York 12226

Date: _____

INMATE NAME	NUMBER	FACILITY
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The decision of the _____
Facility Media Review Committee denying
you the right to receive the publication

(Title)(Author, Date, or Volume and Number)

has been affirmed () reversed () by
the Central Office Media Review Committee
for the following reasons:

If the decision was reversed, you
should receive the publication with this

form. If the decision was upheld, you now
have the following options:

() 1. Receive the publication with the
objectionable portions blotted or cut out.
This option is available only if the
objectionable portion is eight pages or
less, or is a single chapter, article, or
section of any length.

() 2. Have the publication sent to a
person of your choice, not to another
inmate or a Department of Correctional
Services Official,, at your expense. Send
to:

Name: _____

Address: _____

() 3. Have the publication destroyed.
() 4. Have the publication retained at
the facility for 30 days while you make
arrangements for its disposition.

If you do not make this choice within

30 days, disposal of the material will be at the discretion of the Superintendent or his designee.

Send this form to your Facility Medical Review Committee, since all censored publications are returned to this committee.

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APPENDIX C

INDEX TO MATERIALS LODGED WITH THE CLERK OF COURT BY AMICUS CURIAE CORRECTIONAL ASSOCIATION OF NEW YORK

Consolidated Lodging

New York State Department of Correctional
Services Directive 4572 (superseded),
March 2, 19791

Dumont v. Coughlin, 82 CV 1059, Stipula-
tion for Entry of Partial Final Judgment,
Attachment A (N.D.N.Y., October 12,
1983).....7

Auburn Correctional Facility censorship
decision for Illusions of Justice
(6/4/82)35 *

Auburn Correctional Facility censorship
decision for Cointelpro (5/21/82)36 *

Fortune News, August-September 198137
Censorship decision (12/2/81)50

Gay Community News, vol. 9, no. 26
(January 23, 1982)52
Censorship decision (2/10/82)68

Auburn Correctional Facility censorship
decision for The Iron Fist and the Velvet
Glove (2/8/82)69 *

* The corresponding publication, a bound
book, is lodged separately.

Clinton Correctional Facility censorship
decisions (6/11/84, 6/4/84, 5/30/84,
5/29/84, 5/24/84)70

New York Department of Correctional Serv-
ices, Central Office Media Review Com-
mittee Decision (12/8/87)75

Revolutionary Worker, vol. 3, no. 47
(April 2, 1982)76
Censorship decision (4/27/82)96

The Militant, vol. 46, no. 1 (January 1,
1982)97
Censorship decision (2/8/82)117

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IN THE
Supreme Court of the United States

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—v.—

JACK ABBOTT, ET AL.,

Respondents.

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**BRIEF FOR THE *AMICI CURIAE*,
ASSOCIATION OF AMERICAN PUBLISHERS, INC.,
THE AUTHORS LEAGUE OF AMERICA, INC. AND
INTERNATIONAL PERIODICAL DISTRIBUTORS
ASSOCIATION, INC., IN SUPPORT
OF RESPONDENTS**

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ASSOCIATION, INC., IN SUPPORT
OF RESPONDENTS**

PRELIMINARY STATEMENT

The Association of American Publishers, Inc., The Authors League of America, Inc. and the International Periodical Distributors Association, Inc. submit this brief *amici curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of respondents. This brief is submitted upon the written consent of petitioners and respondents, filed herewith.

Amici urge this Court to affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Abbott v. Meese*, 824 F.2d 1166 (D.C. Cir. 1987), for the reasons set forth herein.

THE AMICI

The Association of American Publishers, Inc. ("AAP") is the major national association of book publishers in the United States organized under the laws of the State of New York. AAP's more than 225 members include most of the leading commercial book publishers in the United States, as well as many smaller and non-profit publishers, university presses and scholarly associations. Together, AAP's members publish the majority of all general and educational books published in the United States.

The Authors League of America, Inc. ("Authors League") is the major national society of professional authors, representing more than 14,500 authors, dramatists and journalists. One of the League's principal purposes is to express its members' views in cases involving fundamental questions of freedom of expression and to support that fundamental constitutional right.

The International Periodical Distributors Association, Inc. ("IPDA") is a not-for-profit trade association organized under the laws of the State of New York. It is the trade association for principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to over 400 wholesalers throughout the United States for ultimate distribution to retailers and the public.

Among the wide range of books and periodicals published and distributed by *amici's* members are diverse works¹ dealing

1. Two of the publications censored under the regulations at issue in this case, *The David Kopay Story* and *Soledad Brother: The Prison Letters of George Jackson*, were published by Bantam Books. Bantam is not a plaintiff in this case but is a member of AAP.

with the issues of crime, prisons, race-relations and sexuality. Such works, by distinguished scholars, biographers, journalists and novelists, include fact and fiction and span disciplines such as history, sociology, psychology and criminology.

INTERESTS OF THE AMICI

From early in our nation's history, the press has played a vital role in the development, dissemination and preservation of ideas and knowledge. By promoting the free exchange of ideas, the publishing industry provides an invaluable service to our society: It ensures the public's access to the widest possible range of ideas by fostering an atmosphere that allows room for the unorthodox and unpopular alongside the accepted and conventional, and protects against the imposition of the political, moral or aesthetic views of any one group upon adherents to other viewpoints.

AAP, Authors League and IPDA have appeared frequently as *amici* in cases where the conduct of government officials and agencies has threatened the vitality of a free press by impeding their performance of these central First Amendment functions. This is such a case. *Amici* appear here to caution that, although directed at prison inmates, the 'Bureau of Prisons' (the "Bureau") censorship regulations have far broader effect by impermissibly restricting the freedom of the press. While the regulations appear merely to proscribe what prisoners may read, they additionally impact upon the expression of publishers and writers by inhibiting dissemination of the written word. The regulations thereby imperil First Amendment guarantees to a far greater degree than has been acknowledged by the government.

Viewed in its proper context, this case presents a conflict between the great latitude traditionally afforded to freedom of expression and the government's legitimate interest in maintaining order, security and rehabilitation within its federal prisons. The government would resolve this conflict by giving short shrift to the critical First Amendment rights of publishers and

authors here at stake. For the government, a hypothetical concern over the potentially disruptive effect of a publication suffices to permit prison authorities to deny prisoners access to that publication. For the government, the impact of such a standard upon the First Amendment rights of publishers and authors is a matter of little consequence.

The Court should reject the government's facile and constitutionally insensitive approach to the balancing of interests involved in this case. The First Amendment rights at stake here will be safeguarded adequately only if this Court reaffirms a reviewing standard that requires more than merely a hypothetical link between a censored publication and threatened disruption of prison order and security. To hold otherwise would relegate free speech to secondary importance without requiring prison officials to establish the purported danger to their interest in terms that address the actual exigencies of specific situations. Vague generalities addressed to "order and security" cannot, and should not, justify indiscriminate censorship.

Censorship, however motivated, necessarily intrudes on the creative process by mandating limits which confine and distort the ultimate expression of ideas. Censorship compels publishers and writers to conform their publications to the censors' viewpoint or relinquish an audience for their works. In the instant case, the Bureau's censorship regulations have the disconcerting effect of shrinking an audience for controversial works and isolating prison inmates from the very world to which the prison system would return them rehabilitated.

The prison censorship regulations here under review reflect an increasing tendency to shield segments of society from "dangerous" ideas. Recent history has witnessed a disturbing number of such attempts, through efforts to restrict access to protected expression on the misguided premise that the messenger chronicling complex social issues itself causes, or exacerbates, what are in actuality deeply rooted social problems. It is "[t]he eternal temptation to arrest the speaker rather than to correct the conditions about which he complains." *Houston v. Hill*, ____ U.S. ____, 107 S. Ct. 2502, 2511 n.15 (1987) (quoting

Younger v. Harris, 401 U.S. 37, 65 (1971) (Douglas, J., dissenting)). The notion that works which address these very real problems—offering insights and compassion, and lending hope and dignity to them—would be the target of censors, is antithetical to the First Amendment, the very purpose of which is to encourage open discourse on matters of social and political import free of governmental interference. See *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring), *overruled on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Amici urge that this Court curtail the authority of prison officials, exercised in the guise of ensuring order and security, to infringe upon the constitutional rights of non-inmate publishers and writers to have their works freely circulated and read. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65 n.6 (1963); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). Unless prison officials can justify the content regulation promoted by the censorship regulations as generally necessary to maintain order and security, materials published by the press should not be subject to restriction within prisons. Where, as here, government officials have abused their discretion under a vague and overbroad regulation that allows ideological censorship, this Court should not hesitate to perform its traditional function of correcting the constitutional imbalance.

Accordingly, this Court should affirm the Court of Appeals' decision applying intermediate scrutiny to the censorship of published materials within the prison system and reaffirm the importance of the values of free expression sought to be trivialized by the government.

STATEMENT OF THE CASE

The Overly Broad And Vague Regulations

The Bureau's regulations here in issue require prison employees and officials to determine, with little guidance and on the basis of the ideas the publications express, whether a particular

publication poses a danger to the security and order of the prison. The regulations authorize prison officials—in the first instance, mailroom employees—to reject a publication deemed “detrimental to the security, good order or discipline” of the prison. 28 C.F.R. § 540.71(b) (1986).

Aside from the general and open-ended guidelines contained in 28 C.F.R. § 540.71(b)(2), (5)-(7) (1986), the regulations do not set forth the specific acts or conduct that, if depicted in a publication, would constitute grounds for rejection.² Those guidelines permit, but do not mandate, the rejection of a publication if:

(2) It depicts, encourages or describes methods of escape from correctional facilities . . .

(5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;

(6) It encourages or instructs in the commission of criminal activity;

(7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

28 C.F.R. § 540.71(b)(2), (5)-(7). The non-exhaustive general criteria listed above fail to provide mailroom personnel and wardens with any specific instructions for the interpretation and application of the regulations. The censorship regulations

2. Certain sections of the Bureau's regulations were not challenged. These permit rejection of a publication if:

- (1) It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;
- (2) It . . . contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions;
- (3) It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;
- (4) It is written in code.

28 C.F.R. § 540.71(b)(1)-(4) (1986).

themselves, therefore, leave unanswered the question of what is “detrimental” to “security, good order or discipline,” 28 C.F.R. 540.71(b). That determination is left to the discretion—in the form of personal opinion—of prison employees, a discretion that is not appreciably limited by the non-exhaustive “criteria” contained in the censorship regulations. Pet. App. at 29(a).³

The Suspect Process of Censorship

The record fully supports respondents' contention that the evaluations of incoming publications are superficial at best. Publications mailed to prisoners are delivered to the prison mailroom personnel for review. That initial screening is cursory, lasting only seconds. J.A. at 96. If a mailroom worker flags a publication as objectionable, he or she forwards it to another employee, usually the Supervisor of Education, for review. J.A. at 96-97. This review is similarly cursory, taking at most a few minutes. Witkowski Dep. at 11-12. If the mailroom worker's censorship determination is affirmed, the Supervisor of Education forwards the publication to the Warden for final review. Several Wardens conceded, however, that they rarely reverse a recommendation to censor a publication. Fenton Dep. at 88-89; Witkowski Dep. at 14. One Warden even admitted that he did not read the publications sent to him for review before rubber-stamping the previous rejections:

We don't read the articles. I'm not interested in the articles, and the mailroom isn't. They don't have time to read articles, and I don't either.

J.A. at 77.

The regulations require the mailroom workers and prison officials to rely on their own personal beliefs to evaluate incom-

3. “Pet. App.” refers to the Petitioners' Appendix on Writ of Certiorari; “J.A.” refers to the Joint Appendix; “Dep.” refers to the depositions which were admitted into evidence (Trial Transcript, 1548, 1551); “Adm.” refers to the Defendants' (Petitioners') Responses to Plaintiffs' Requests for Admissions; “P. Exh.” refers to Plaintiffs' Exhibits submitted into evidence at trial.

ing publications.⁴ The mailroom personnel and the censoring officials receive no formal training in interpreting or applying the vague censorship regulations. Spidle Dep. at 72-73; Nave Dep. at 76; Featon Dep. at 85-86, 114; Hanberry Dep. at 14; Witkowski Dep. at 4-5. The Lewisburg Warden justified this lack of training by stating, "if the mailroom worker has any brains at all, he's supposed to know if something is going to cause a problem." Fenton Dep. at 86. The evaluation of incoming publications thus necessitates reliance on the personal predilections of both the mailroom personnel and their superiors.

The impact of the censorship regulations is compounded by the "all or nothing" rule under which an entire publication is rejected if one article—or one paragraph or one sentence—is deemed objectionable. The mailroom personnel and their superiors thus reject entire publications after only a brief review, cursory and superficial at best.

The Banned Publications

The government's interest in promoting order, security and rehabilitation within its federal prisons concededly must entail content-based choices and value judgments related to penological goals. However, the actions of the prison officials under the challenged regulations amount to viewpoint-based censorship, exercised with neither professionalism nor restraint and justified by only the most tenuous connection to legitimate concerns. Even a cursory review of the censored publications in the

4. The record amply supports the contention that the Bureau's censorship regulations allow for—indeed, even require—the assertion of personal prejudices in the review of publications. One mailroom worker at Lewisburg described the standards she employed in reviewing incoming publications, standards she herself created:

Sex is a standard. Radical is a standard. I will go out on a limb and say Communism and Fascism is a standard I would use. It is more of a political-sexual type standard I personally use. I have not been told.

J.A. at 97. A Supervisor of Education who reviews the determinations of the mailroom staff admitted that he relied on "personal opinion." Nave Dep. at 76.

instant case reveals that the regulations have operated to exclude those publications that advocate or describe unconventional ideas and ways of life.

For example, prison officials in Atlanta and Marion excluded *The David Kopay Story*, the autobiography of a professional football player, because it was "used to entice and propagate the gay movement," J.A. at 118, Adm. #635, and because the "[h]omosexual nature of the book was not in the best interest of the orderly running of the institution," J.A. at 116, Adm. #626. See also J.A. at 117, Adm. #632. The autobiography, which is devoid of explicit depictions of sexual acts, poignantly describes the tension Kopay experienced in accepting his own homosexuality while the media proclaimed him a macho football hero. Yet the federal prisons in Atlanta and Marion rejected the book even though concededly it did not "advocate assaults or rapes" J.A. at 118, Adm. #634. Notably, other federal maximum security prisons—Terre Haute, J.A. at 116, Adm. #625, McNeil Island, J.A. at 116-17, Adms. #628, #629, and Leavenworth, J.A. at 117, Adm. #630,—accepted Kopay's book and delivered it to inmates without disturbance. Nothing in the record indicates that circumstances unique to the Atlanta and Marion prisons justified the book's rejections there. Thus, Kopay's book was rejected not because its contents provided a tangible threat to prison security, but rather, because it was sympathetic to the gay movement⁵ and thereby addressed a topic antagonistic to the views of the censors.

Prison officials have relied on the Bureau's censorship regulations to reject as well publications that advocate unorthodox political ideas. Without specifying the particular passage or section of the book that they deemed would threaten security, prison officials excluded *Soledad Brother: The Prison Letters of George Jackson* on the grounds that it "enable[s] or otherwise advocate[s] conduct which cannot be permitted in a prison

5. Prison officials also censored issues of *Workers' World* and *Join Hands* on the grounds that they "support . . . the gay rights of inmates," J.A. at 126, Adm. #934, and "advocate[] homosexuality," J.A. at 121, Adm. #760.

setting," P. Exh. 67, and "tend[s] to compromise the discipline and good order of the institution," P. Exh. 68.

Described by *The New York Times Book Review* as "one of the finest pieces of black writing ever to be printed," Lester, "Review of *Soledad Brother*," *N.Y. Times Book Review*, November 22, 1970, at 10, col. 4, Jackson's book is composed of letters written to his immediate family, his attorney and others during his incarceration:

I know that few blacks over here have ever been free. The forms of slavery merely *changed* at the signing of the Emancipation Proclamation from chattel slavery to wage slavery. If you could see and talk to some of the blacks I meet in here you would immediately understand what I mean, and see that I'm right. They are all average, all with the same backgrounds, and in for the same thing, some form of food getting. About 70 to 80 percent of all crime in the U.S. is perpetrated by blacks, "the sole reason for this is that 98 percent of our number live below the poverty level in bitter and abject misery!" Take off your rose-colored glasses and stop pretending. We have suffered an unmitigated wrong! How do you think I felt when I saw you come home each day a little more depressed than the day before? How do you think I felt when I looked in your face and saw the clouds forming, when I saw you look around and see your best efforts go for nothing—nothing. I can count the times on my hands that you managed to work up a smile.

G. Jackson, *Soledad Brother: The Prison Letters of George Jackson*, 65 (1970) (original emphasis). As this excerpt from a letter to his father movingly portrays, the book records "one man's solitary act of willing himself to exist on the basis of his rage at what had been done to him as a black." Lester, "Review of *Soledad Brother*," *N.Y. Times Book Review*, November 22, 1970, at 10, col. 4. It is a political statement, the impact of which "may be even greater" than that of "The Autobiography

of Malcolm X." *Id.* The political nature⁶ of Jackson's book is precisely what prompted mailroom employees and their superiors to reject the publication.

ARGUMENT

I.

THE BUREAU OF PRISONS' CENSORSHIP REGULATIONS WORK AN UNCONSTITUTIONAL RESTRICTION ON THE FIRST AMENDMENT RIGHTS OF FREE CITIZENS—NOTABLY THE PRESS

The government narrowly frames the issue presented by this case to involve the standard of scrutiny which should apply to regulations that implicate *prisoners'* First Amendment rights. However, "[t]he Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). As the Court of Appeals recognized, the First Amendment interests to be considered in this case transcend those of the prisoners. They involve centrally the rights of a free press to disseminate ideas free of government censorship. Accordingly, the constitutional interests to be taken account of in this case are far more weighty than suggested by the government. Indeed, the key issue in this case involves determining the level of scrutiny that will accommodate the legitimate concern for maintaining order and security in the prisons while safeguarding the freedoms that authors, publishers and their distributors are guaranteed by the First Amendment.

6. Prison officials similarly censored political speech when they rejected magazines such as *The Labyrinth* and *The Torch*. The April, 1977 issue of *The Labyrinth* criticized the medical treatment of inmates, and was rejected as "inflammatory," J.A. at 122, Adm. #772, and "slanted," Williams Dep. at 121. Prison officials rejected *The Torch* because it "has a tendency to develop an adversary attitude by inmates toward staff which can cause an unhealthy environment in this institution." J.A. at 125, Adm. #912.

A. The Censorship Regulations Restrict Dissemination Within Prisons Of Works On Controversial Public Affairs—Speech That Is At The Heart Of The First Amendment's Protection

As the founders of this nation understood, "[w]here the press is free, and every man able to read, all is safe." Letter to Col. Charles Yancey in 14 *The Writings of Thomas Jefferson* 384 (Lipscomb Ed. 1904) (quoted in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 260 n.2 (1974) (White, J., concurring)). They therefore amended our Constitution to read: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. Const. amend. I. The press' special role "in informing and educating the public, offering criticism, and providing a forum for discussion and debate" is thus explicitly "constitutionally recognized." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. at 781. See *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863-64 (1974) (Powell, J., dissenting). The stated rationale for fostering and preserving this special role is the encouragement of informed democratic self-rule: "[S]peech concerning public affairs . . . is the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), *overruled on other grounds by Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), "[a]nd self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources,' " *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. at 777 n.12 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

The speech restricted by the Bureau's censorship regulations is at the very heart of the First Amendment's protection:

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed

or appropriate to enable the members of society to cope with the exigencies of their period.

Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940); see also *Hustler Magazine v. Falwell*, ____ U.S. ____, 108 S. Ct. 876, 879 (1988) ("[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (the First Amendment ensures that debate on public issues remain "uninhibited, robust, and wide-open"); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (the First Amendment was designed to secure "the widest possible dissemination of information from diverse and antagonistic sources"). Speech that criticizes government and addresses the problems of society is entitled to the highest degree of First Amendment protection. Ordinarily, any restriction of such speech is subject to the strictest scrutiny and is upheld only if it serves a "compelling" or "substantial" state interest and is "narrowly drawn" or "finely tailored" to achieve its goal. See *Arkansas Writers' Project, Inc. v. Ragland*, ____ U.S. ____, 107 S. Ct. 1722, 1728 (1987); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980). See also *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) ("narrowly tailored to [the government's] legitimate objectives").

The majority of the publications censored by the Bureau involve matters of public affairs⁷ and thus fall within this Court's description of core protected speech. Some, like *The Guardian*, a political news magazine, and *The Labyrinth*, a magazine critical of prison administration and prison medical care, are critical of the criminal justice and penal systems. Others, like *The David Kopay Story*, or *Soledad Brother: The Prison Letters of George Jackson*, discuss controversial views

7. Unlike obscenity, *Miller v. California*, 413 U.S. 15 (1973), advocacy of imminent lawless action, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), libel, defamation or fraud, see *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Beuharnais v. Illinois*, 343 U.S. 250 (1952), or "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the censored materials do not "fall within those relatively few categories" of speech that may be justifiably somewhat restricted, *Cohen v. California*, 403 U.S. 15, 19-20 (1971).

on social and political matters. But for the prison context in which these publications were to be read, no one would suggest that these expressions could be silenced.

Ordinarily, the government may not restrict speech because of its communicative impact—"a fear of how people will react to what the speaker is saying." J. Ely, *Democracy and Distrust* 111 (1980). "Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be." *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 327-28 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). Thus, relying on the "free trade in ideas," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting), if further exchange of ideas can avert the feared harm, governmental suppression is unnecessary.⁸

The government's argument that the censorship undertaken by the Bureau has a *de minimis* impact upon publishers' audiences hardly justifies that censorship. The government cannot legitimize ideological censorship whether it effects one reader or one million readers. Unless the government can demonstrate far more directly than the regulations require that a constitutionally-protected work, if read by the prison population, will likely impair a substantial governmental interest in security, order or rehabilitation, the mere fact that such work is available to be read by non-prisoners forms no basis for censoring the work as to the prison population.

There are, moreover, consequential effects of choking off insightful, if controversial, works from the prison population. Censorship limits the pool of information available to prisoners and necessarily limits their participation in public discourse. "Freedom to distribute information to every citizen wherever

8. Even speech advocating illegal conduct such as the use of violence or crime cannot be proscribed unless the advocacy is "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). This strict standard thus contemplates both a causal relationship and an element of immediacy. See *Watts v. United States*, 394 U.S. 705 (1969); *Bond v. Floyd*, 385 U.S. 116, 133-34 (1966).

he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved." *Martin v. Struthers*, 319 U.S. 141, 146-47 (1943).

Publications about controversial social and political issues promote public debate on those issues. If particular works dealing with subject matters of interest to an incarcerated person are withheld from him, that individual effectively is shut off from participating in that debate.⁹

Publications discussing prison administration, the penal system and sexuality tackle some of the most important concerns of today's society. Given their vantage point, inmates have a role in informing society about administration of the prisons and about the penal system generally. The Bureau's censorship regulations stifle vital social discourse, in opposition to constitutional mandate, and are deserving of scrutiny under the intermediate standard enunciated in *Procunier v. Martinez*, 416 U.S. 396 (1974).

9. "Although committing an illegal act may require the physical segregation . . . it does not dictate that the prisoner's mind be similarly locked away to atrophy during the period of his incarceration." *Abdul Wali v. Coughlin*, 754 F.2d 1015, at 1034 (2d Cir. 1985). Moreover,

"[i]n the close and restrictive atmosphere of a prison, first amendment guarantees taken for granted in society at large assume far greater significance. The simple opportunity to read a book or write a letter, whether it expresses political views or absent affections, supplies a vital link between the inmate and the outside world, and nourishes the prisoner's mind despite the blankness and bleakness of his environment."

Id. at 1034 n.11, (quoting *Wolfish v. Levi*, 573 F.2d 118, 129 (2d Cir. 1978), *rev'd on other grounds sub nom. Bell v. Wolfish*, 441 U.S. 520, 550-51 (1979) ("publisher-only" rule for receipt of hardcover books upheld as reasonable response to "obvious problem" of preventing smuggling into prison of contraband)).

B. The Censorship Regulations Effect A Prior Restraint On The Dissemination Of Published Materials And Are Therefore Inherently Constitutionally Suspect

Not only are the regulations suspect because of the nature of the speech at issue; they are also suspect as a prior restraint. The regulations have the effect of requiring the government's advance permission prior to publishers communicating their ideas to a prison audience—a form of government restraint that is inherently suspect. *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *Near v. Minnesota*, 283 U.S. 697, 713-19 (1931) (major purpose of First Amendment guarantee of free press was to prevent prior restraints upon publication); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-04 (1952) (statute that required motion picture license was prior restraint; communicative event of film showing was "publication"). "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and is only tolerated when operated under close judicial supervision to determine the validity of the restraint. *See Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). *See also Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (regulation "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system"). Because the regulations are inherently suspect as a prior restraint, they should be reviewed under a standard of scrutiny more stringent than the mere "reasonable relationship" test proposed by the government.

C. The Censorship Regulations Lack The Predicate Viewpoint Neutrality Required For Application Of The "Reasonable Relationship" Test In A Prison Context

The regulations require that prison employees examine published materials to determine whether they are "detrimental" to the "security, good order or discipline" of the prison. Necessarily such censorship is content-based. However, any governmental restriction of expression based on the content or viewpoint expressed is constitutionally suspect. "[A]bove all

else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

In non-public forums, some content-based restrictions may be tolerated. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). The government may restrict speech on the basis of content in a non-public forum as long as the regulations "are reasonable in light of the purpose which the forum at issue serves." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983). However, even content-based restrictions must be "viewpoint-neutral." *Cornelius*, 473 U.S. at 811 & 806. "[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject." *Cornelius*, 473 U.S. at 806.

Within the prison context, this Court has continued to stress the importance of viewpoint neutrality. "Prison officials may not censor . . . simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements." *Procunier v. Martinez*, 416 U.S. at 413; *accord Turner v. Safley*, ____ U.S. ____, 107 S. Ct. 2254, 2264 (1987) ("[t]he rule is content-neutral"); *Bell v. Wolfish*, 441 U.S. 520, 551 (1979) ("The [restriction] operates in a neutral fashion, without regard to the content of the expression.") (citing *Pell v. Procunier*, 417 U.S. 817, 828 (1974)). Thus, even though this Court has upheld some regulations impacting speech in a prison context if merely reasonably related to penological objectives, *see, Turner*, ____ U.S. ____, 107 S. Ct. at 2264 (inmate-to-inmate correspondence); *Wolfish*, 441 U.S. at 550 (hardcover books); *Pell*, 417 U.S. at 828 (face-to-face media interviews with prisoners), it has unwaveringly pronounced that the predicate for applying the "reasonableness" standard to restrictions of expression in non-public forums is viewpoint neutrality: A reasonable justification "will not save a regulation that is in reality a facade for viewpoint discrimination." *Cornelius*, 473 U.S. at 811.

The censorship regime here under review is notable for its absence of viewpoint neutrality. As previously discussed, in practice the regulations allow for censorship based on the personal preferences of prison employees. The rules thereby promote an orthodoxy of views by sanctioning blatant viewpoint exclusion. The employment of "standards" such as "radical," "comununist" or "fascist" hardly deserves consideration under the "reasonableness" standard that the government argues should apply.

Even were the issue presented solely to involve the constitutional rights of prisoners, the government could not avoid the weight of authority commanding stricter-than-mere-reasonableness scrutiny of non-viewpoint-neutral regulations simply by arguing the need for deference to penological objectives. Where, as here, speech of non-prisoners is centrally at issue, the government's resort to a "reasonableness" standard carries all-the-less force.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT THE INTERMEDIATE SCRUTINY STANDARD ENUNCIATED IN *PROCUNIER V. MARTINEZ* APPLIES TO THE REVIEW OF PRISON CENSORSHIP REGULATIONS THAT CONSEQUENTIALLY RESTRICT PUBLISHERS' FIRST AMENDMENT RIGHTS

In *Procunier v. Martinez*, 416 U.S. 396 (1974), this Court formulated a test to accommodate both the First Amendment rights of non-inmates and the legitimate interest of maintaining security and order in the prisons. That test remains good law¹⁰ and is controlling in this case.

10. Contrary to petitioners' characterization, the "generally necessary" standard enunciated in *Martinez* has not been abandoned in the prison context in instances in which a regulation works a consequential restriction on non-inmates' constitutional rights. In *Turner v. Safley*, _____ U.S. _____, 107 S. Ct. 2254 (1987), this Court implicitly reaffirmed the validity and applicability of the *Martinez* standard to restrictions of non-inmates' constitutional rights. Striking down a regulation prohibiting inmate marriages, Justice O'Connor wrote that the "implication of the interests of non-prisoners may support application of the *Martinez* standard" *Turner*, _____ U.S. _____, 107 S. Ct. at 2266. However, because the marriage prohibition could not withstand scrutiny even under the lesser "reasonable relationship" test, the Court had no need to address the issue. *Id.*

A. The Consequential Restriction Of Publishers' First Amendment Rights Triggers Application Of The Standard Of Review Enunciated By This Court In *Martinez*

In *Martinez*, prison inmates challenged a state regulation which proscribed any personal correspondence deemed to "unduly complain" or "magnify grievances," *id.* at 399 n.2, or express "inflammatory political, racial, religious or other views or beliefs," *id.* at 399 n.3. The Court recognized that when a non-prisoner is prohibited from communicating with a prisoner, the rights of the two parties become "inextricably meshed" and censorship of the communication works a consequential restriction of the non-prisoner's First Amendment rights. *Id.* at 409. Because the challenged restriction implicated the First Amendment rights of free citizens, the Court expressly declined to evaluate it under the standard of review applicable if the First Amendment rights of only prisoners were involved. *Id.* at 408-09.

Writing for a unanimous Court, Justice Powell enunciated the standard that the government must meet to justify any censorship of written expression which impacts on non-inmates' rights:

First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Sec-

ability of the *Martinez* standard to restrictions of non-inmates' constitutional rights. Striking down a regulation prohibiting inmate marriages, Justice O'Connor wrote that the "implication of the interests of non-prisoners may support application of the *Martinez* standard" *Turner*, _____ U.S. _____, 107 S. Ct. at 2266. However, because the marriage prohibition could not withstand scrutiny even under the lesser "reasonable relationship" test, the Court had no need to address the issue. *Id.*

ond, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus, a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad. This does not mean, of course, that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty. But any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interests identified above.

Id. at 413-14. The impact that the challenged regulations have upon the First Amendment rights of non-prisoners—in this instance, the press—mandates the application of the *Martinez* standard to this case.

B. Publishers Have A "Particularized Interest" In Communicating With Prison Inmates Who Have Requested Specific Published Materials

The government argues that the *Martinez* standard is extremely narrow and applies solely to correspondence between inmates and outsiders. In effect this argument posits that publications mailed to prisoners are less deserving of First Amendment protection than letters because of the relationship between the sender and the recipient. Petitioners' argument not only denigrates the role of the press in our self-government, see *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. at 781; *Mills v. Alabama*, 384 U.S. at 219; it would also apparently institute a hierarchy of First Amendment protections based on the medium (letter versus publication) and identity of the speaker (correspondent versus publisher/author).

Contrary to the government's assertions, communications between publishers and inmates in the form of published materials fall squarely within the scope of the "particularized" communications contemplated by *Martinez* because these materials are mailed to prisoners in response to the inmates' individual requests and subscriptions.¹¹

[A] personal subscription to, or single order of a particular publication more nearly resembles personal correspondence than a mass mailing. Like personal correspondence, a subscription represents the exercise of volition by both sender and recipient. The sender's interest in communicating the ideas in the publication corresponds to the recipient's interest in reading what the sender has to say.

Brooks v. Seiter, 779 F.2d 1177, 1180 (6th Cir. 1985). Moreover, there can be "no principled basis for distinguishing publications specifically ordered by a prison inmate from letters written to that inmate for purposes of first amendment protection." *Id.* at 1181.

When a publisher mails material at an inmate's request and the inmate reads the material, an important two-way communication has occurred. In effect the inmate has asked the publisher, "What do you have to say?" and the publisher has responded. This communication may spark further discussion of the issues with a new participant—indeed, the prisoner may be inspired to write a letter.¹² This communicative transaction is central to what Justice Brandeis recognized to be our society's preferred means of arriving at the truth: Speech is the tool of its discovery; the more individuals who are allowed to participate, the easier and more informed is that discovery. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

11. Unlike the censored publications in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130 (1977), none of the rejected publications here at issue were part of a bulk mailing to inmates.

12. Under the government's rationale, a letter to the editor written by an inmate would be subject to greater protection, in the form of heightened scrutiny, than the publication that inspired the letter.

overruled on other grounds by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Whereas the government argues that the prison regulations "simply reduce the potential audience for a particular issue of a publication," Brief for Petitioner at 21, the right of each publisher to communicate to an inmate through any issue or any publication is indivisible under our Constitution. Just as "[c]ommunication by letter is not accomplished by the act of writing words on paper," *Martinez*, 416 U.S. at 408, expression through publication is not accomplished solely by the act of printing a book, magazine or newspaper. Communication contemplates more than mere creation of speech; it contemplates a receiver. "Liberty of circulating is as essential to [freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex Parte Jackson*, 96 U.S. 727, 733 (1878), quoted in *Lakewood v. Plain Dealer Publishing Co.*, ____ U.S. ____, 108 S. Ct. 2138, 2149-50 (1988). "The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65 n.6 (1963) (citing *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)).

Recipients of speech are not fungible commodities; each communication between a publisher and an individual reader is unique, valuable, and protected by the First Amendment.¹³ Just as a correspondent has a constitutionally protected interest "against unjustified governmental interference with the intended communication," *Martinez*, 416 U.S. at 409, authors and publishers of books and periodicals must enjoy the same protection under the First Amendment.¹⁴

13. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

14. A number of circuit courts have recognized a prisoner's First Amendment right to receive printed publications by mail order or subscription. See, e.g., *Pepperling v. Crist*, 678 F.2d 787 (9th Cir. 1982); *Trappnell v. Riggsby*, 622 F.2d 290 (7th Cir. 1980); *Guajardo v. Estelle*, 580 F.2d 748 (5th Cir. 1978).

C. The *Martinez* Standard Is Intermediate, Not Strict, Scrutiny

The government improperly denominates the *Martinez* test a strict scrutiny standard, and thereby postures this case as one requiring a choice between levels of judicial review, of the regulations in issue, that are at opposite ends of the spectrum. In actuality, the intermediate scrutiny test prescribed by *Martinez* can comfortably accommodate the First Amendment rights of non-inmates and the government's penological objectives.

"Strict scrutiny" denotes the most stringent standard of review under which a court will judge government restrictions on First Amendment rights and is framed in language quite different from the *Martinez* test. Under strict scrutiny, regulation of expression is justified only by a showing that the regulation is precisely tailored to serve a "compelling" state interest, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. at 795, or a "paramount" interest "of vital importance," *Elrod v. Burns*, 427 U.S. 347, 362 (1976) ("a significant impairment of First Amendment rights must survive exacting scrutiny"), or to prevent a "clear and present danger," *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (per curiam) (distinguishing advocacy from "incitement to imminent lawless action"). Strict scrutiny reflects the "heavy justification" required for governmental subordination of the First Amendment's mandate against restraint of expression. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 733 (1971) (White, J., concurring). The strict standard is easily distinguished from the *Martinez* test, which does not require "precise tailoring," a "compelling state interest" or a "clear and present danger," but instead requires that the regulation be "generally necessary to protect one or more legitimate governmental interests." *Martinez*, 416 U.S. at 414.

Although core First Amendment speech is usually given utmost protection, the Court in *Martinez* considered and rejected "strict scrutiny"¹⁵ as the appropriate standard to apply

15. See, e.g., *Wilkinson v. Skinner*, 462 F.2d 670, 672-73 (2d Cir. 1972); *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968); *Fortune Soc'y v. McGinnis*, 319 F. Supp. 901 (S.D.N.Y. 1970).

to consequential restrictions on non-inmate expression in deference to the legitimate penological concerns of the government. *Id.* at 406-07. However, the Court also considered and rejected a standard of review that deferred completely to the decisions of prison officials—the “hands-off” approach.¹⁶ *Id.* at 406.

In fashioning a test that would provide an appropriate level of deference to the government’s interest in maintaining security yet accommodate the First Amendment rights of non-inmates, Justice Powell, writing for the Court, favored the “intermediate position,” articulated in *Carothers v. Follette*, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970): A “regulation or practice which restricts the right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably and necessarily to the advancement of some justifiable purpose.” *Martinez*, 416 U.S. at 407 (quoting *Carothers v. Follette*, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970) (citations omitted)). Having rejected both the strict scrutiny and the “hands-off” standards of review, the Court examined the intermediate test formulated in *United States v. O’Brien*, 391 U.S. 367 (1968), to address an incidental restriction on speech.¹⁷ The Court in *O’Brien* required that the regulation in question further an “important or substantial governmental interest . . . unrelated to the suppression of free expression” and that “the incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of that interest.” *Id.* at 377.

In *Martinez*, the Court formulated a standard that combined the teachings of both *Carothers* and *O’Brien*. To pass constitutional muster, a regulation that consequentially restricts non-inmates’ First Amendment rights “must be generally necessary

16. See, e.g., *McCloskey v. Maryland*, 337 F.2d 72 (4th Cir. 1964); *Krupnick v. Crouse*, 366 F.2d 831 (10th Cir. 1966).

17. In *United States v. O’Brien*, 391 U.S. 367 (1968), petitioner had been convicted for burning his draft registration certificate under a federal statute prohibiting such mutilations. Even though the regulation restricted O’Brien’s free expression, the Court upheld the statute as a valid means of furthering an important governmental interest.

to protect one or more of the legitimate governmental interests” *Martinez*, 416 U.S. at 414.

The *Martinez* intermediate standard gives due deference to prison officials. It recognizes that prison officials need reasonable latitude to determine how to meet security and other objectives. However, it also recognizes that “a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.” *Id.* at 405-06 (citing *Johnson v. Avery*, 393 U.S. 483, 486 (1969)).

Contrary to the government’s assertions, the *Martinez* standard is not without force. If a regulation is no more intrusive than generally necessary to further an important or substantial governmental interest unrelated to the suppression of expression, it will withstand intermediate scrutiny. *Martinez*, 416 U.S. at 413-18. Indeed, numerous prison censorship regulations have been upheld under the *Martinez* standard. See *Espinoza v. Wilson*, 814 F.2d 1093, 1098-99 (6th Cir. 1987) (upholding ban on certain homosexual publications in Kentucky prison in deference to warden’s determination, supported by evidence of murder and mutilation directly linked to homosexual activity, that publications posed security problem); *Meadows v. Hopkins*, 713 F.2d 206, 211 (6th Cir. 1983) (upholding censorship regulation that authorized prison staff to read all general correspondence and “delineate[d] with specificity material which is deemed censorable”); *Vodicka v. Phelps*, 624 F.2d 569, 571 (5th Cir. 1980) (upholding Louisiana prison regulation barring admission into prison of publications determined to constitute “an immediate threat” to security; regulation at issue was tailored “to ban only those publications which pose a real threat to the security and order of the institution.”); *Carpenter v. South Dakota*, 536 F.2d 759 (8th Cir. 1976) (upholding censorship of mail containing sexually explicit material), cert. denied, 431 U.S. 931 (1977).

That application of the *Martinez* standard to the instant regulations requires the striking down of a regulation wholly insensitive to First Amendment concerns forms no basis for doubting the soundness of *Martinez*. Rather, it reflects the continuing need for a careful, and practical, judicial balancing of interests in the prison setting where important First Amendment interests are at stake.

CONCLUSION

For the reasons set forth above, *amici curiae* respectfully urge that this Court affirm the decision and order of the United States Court of Appeals for the District of Columbia Circuit.

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